The Law of Civil Rights and Civil Liberties

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Member of the New York Bar

LEGAL ALMANAC SERIES NO. 13

The Law of

Civil Rights

and

Civil Liberties

A Handbook of Your Basic Rights

by

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This is Volume 13 *of the LEGAL ALMANAC SERIES, which brings the law on various subjects to you in non-technical language. These books do not take the place of your attorney's advice, but they can introduce you to your legal rights and responsibilities.*

OCEANA PUBLICATIONS

Dedicated to my beloved wife

EVALINE

admirer, critic and helping hand

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Official Bodies

Civil Rights Section, Dept. of Justice—Washington, D. C.
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Business groups

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National Catholic Welfare Council—1312 Mass. Ave., NW, Wash., D.C.
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Protestant Council of New York, Human Relations Division—71 West 23rd St., New York City

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Catholic Interracial Councils—Baltimore, Brooklyn, Chicago, Detroit, Hartford, L.A., N.Y.C., Phila., St. Louis, Syracuse, Wash. D.C.

Chicago Commission on Human Relations—134 No. LaSalle St., Chicago

Cincinnati Mayor's Friendly Relations Committee—Room 105, City Hall, Cincinnati

Detroit Interracial Committee—305 West Fort St., Detroit

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Jewish Community Relations Councils—Boston, Brooklyn, Cleveland, Detroit, Indianapolis, L.A., Phoenix, Phila., Pittsburgh and others

Los Angeles Community Relations Committee—2511 Wilshire Blv., L.A.

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Community education groups

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Institute for American Democracy—369 Lexington Ave., New York City

Institute for Democratic Education—415 Lexington Ave., New York City

Survey Associates, Inc.—112 East 19th St., New York City

Labor groups

Amalgamated Clothing Workers—15 Union Square, New York City

Central Labor Council—Box 63, Kalispell, Montana

International Ladies Garment Workers Union—1710 Broadway, N.Y.C.

Jewish Labor Committee—175 East Broadway, New York City

National CIO Committee to Abolish Racial Discrimination—718 Jackson Place NW, Washington, D.C.

National Labor Service—425 Fourth Avenue, New York City

UAW-CIO Fair Practices Committee—618 Maccabees Bldg., Detroit

Workers Defense League—112 East 19th Street, New York City

Workers Education Bureau, AFL—1440 Broadway, New York City

Veterans groups

American Legion—777 No. Meridian Street, Indianapolis

American Veterans Committee—1200 Eye St. NW, Washington, D.C.

Catholic War Veterans—17 E. 51st Street, New York City

Jewish War Veterans—50 W. 77th St., New York City

Regular Veterans Association—276 Fifth Avenue, New York City

Veterans of Foreign Wars—34th Street and Broadway, Kansas City

FOREWORD

The purpose of this work is to render understandable to the intelligent layman the civil rights and civil liberties issues which underlie many current problems and to present these problems factually and objectively. For those who desire more extensive information and more intensive analysis, the following works are particularly recommemded:

Chafee, Z., Freedom of Speech and the First Amendment (1941)
Carr, R. K., Federal Protection of Civil Rights (1947)
Fraenkel. O. K., Our Civil Liberties (1944)
Fraenkel, O. K., 150 Years of the Bill of Rights (1939)
Johnson, A. W. & Yost, F., Separation of Church and State in the United States (1948)
Konvitz, M., The Constitution and Civil Rights (1947)
Report of the President's Committee on Civil Rights (1947)

In addition, the author recommends the compilation of laws against discrimination prepared by the New York State Commission against Discrimination; the handbooks analyzing state anti-discrimination laws prepared by the American Jewish Committee and the Anti-Defamation League of B'nai B'rith; the check list of state anti-discrimination laws prepared by the American Jewish Congress; the Annual Reports of the American Civil Liberties Union; and the popular pamphlets analyzing the Report of the President's Committee on Civil Rights, prepared by the Federal Council of Churches of Christ in America and The Woman's Division of the Methodist Church.

The author wishes to acknowledge with special thanks the wise counsel and helpful criticism of Ralph K. Bass, Dr. S. Andhil Fineberg, Margaret E. Hall, Will Maslow, Mrs. Dorothy M. Nathan and, last but not least, the author's wife, Evaline Lipp Newman, to whom this work is dedicated.

Edwin S. Newman

APRIL 26, 1949
FLUSHING, LONG ISLAND.

PREFACE

Life, liberty and the pursuit of happiness, the foundation stone of American society, is made possible through the exercise of our constitutionally guaranteed freedom. It is this freedom—not a Utopian dream, but specific and definable rights and liberties—that has given to Americans an individual worth and dignity denied to the great majority of the world's inhabitants. It is this freedom which is our most effective challenge to those systems of government, the totalitarianisms of the right and of the left, which reduce the individual to the status of an obedient robot.

The essence of our freedom is in our civil liberties and in our civil rights. Through them, we, as individuals, are protected against both the excesses of government and the excesses of those among us who are intolerant of differences of opinion and of people of a different religious faith, or a darker skin. What are these civil liberties and these civil rights? They are not theories or intangibles reserved for academic discussions of constitutional law. They are in the sum and substance of our daily lives. Though we take them for granted, they are at the very root of our being able to say what we think, worship as we please, enjoy the good things of life—the chance to have the right job, an education, and a home. These can be ours in this country no matter what our economic, our social position or our ethnic origin.

To help preserve these rights, it is essential for every American to know precisely what they are. Further, every American should know the limitations on their exercise and every American should be in a position to make an informed judgment when the protection and extension of those rights are at issue. I have found in the course of my experience in administering

the New York State Law against Discrimination that a right has its maximum meaning only to the extent that there is knowledge and understanding of it—on the part of the persons it protects, on the part of the persons it affects, on the part of the general public whose acceptance of it will either strengthen or dissipate its value.

Knowledge of our rights, then, is a prime element in their protection and enforcement. It is the purpose of this publication to bring this knowledge to the American layman by making available a non-technical handbook stating his rights. In these pages are stated the organic laws that constitute our Bill of Rights. Freedom of speech, press, assembly and religion; separation of Church and State; the right to trial by jury; the right to counsel; the privilege against self-incrimination; protection against unwarranted searches and seizures—the major elements of freedom of expression and of personal liberty are considered. In addition, the constitutional and statutory provisions designed to protect the individual from violation of his rights are reviewed. The laws presented affect freedom from slavery and involuntary servitude; protection of the right to vote; laws forbidding discrimination for reasons of race, color or creed in employment, education, housing, social welfare, travel, accommodations; defense against unequal justice, police brutality and lynching.

To the extent that knowledge of these rights becomes part and parcel of every American's thinking and leads to his sound functioning in relation to them, our democracy and our individual peace of mind and security will be strengthened. Because of that fact I welcome the present work, an objective and factual presentation of civil rights and civil liberties as they exist today.

Caroline K. Simon

Commissioner, New York State Commission
Against Discrimination.

CIVIL LIBERTIES

When our founding fathers made us one nation, they had this fear—that a strong central government might overrun the rights of the people. To prevent this, they drew up a list of prohibitions which the federal government was forbidden to do. No religion was to be established; the people were to enjoy freedom of speech, press, assembly and religious worship; a man's life, liberty and property were to be protected against arbitrary action by government. These prohibitions, securing freedom of expression and the protection of personal liberty, were set down in the Bill of Rights, the first ten amendments to the Constitution.

Initially, these prohibitions were directed only against the federal government. The respective states, however, in their own constitutions, adopted similar prohibitions protecting the liberty of the people against arbitrary action by state government. Then, after the Civil War, the Fourteenth Amendment to the Constitution was passed. Under this amendment, no state could deprive any person of life, liberty or property without due process of law. Gradually, this "due process" clause of the Fourteenth Amendment came to include most of the prohibitions of the Bill of Rights, so that the Constitution became complete protection for the people against the action of both state and federal government. These rights, protected by the Bill of Rights and by the Fourteenth Amendment, are known as our "civil liberties."

Specifically, they include the requirement that Church and State be separated; the freedom of speech, press, assembly and religion; protection against double jeopardy; the right not to be a witness against onesself; protection against unreasonable searches and seisures and against excessive fines and punishments; the right to counsel in criminal cases; and the right to trial by jury. Of course, the exercise of these rights is not absolute; nor is the extent of protection always the same regardless of whether a state or the federal government is involved.

CHAPTER ONE

FREEDOM OF EXPRESSION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." This initial guarantee of the Bill of Rights, contained in the First Amendment to the Constitution, separates the Church from the State and protects the freedom of expression—religion, speech, press and assembly. While this Amendment deals only with what the federal government may not do, the states are likewise limited both by their own constitutions and by the "due process" clause of the Fourteenth Amendment.

THE SEPARATION OF CHURCH AND STATE

We begin with the premise that, under the Constitution, neither a state nor the federal government can set up a church, pass laws which aid one religion or even all religions, or in any way prefer one religion over another. The development of this doctrine is part of the political history of America. In colonial times, there existed a strong alliance between the Church and the government. But the support which the Anglican Church gave to England during the Revolutionary period embittered the colonists and led them to rebel at the idea of paying taxes to support the Church. The result was that Jefferson, with strong popular support, was able to win his fight for separation.

It was in the educational field, however, traditionally within the domain of the Church, that the most bitter issues were fought, and not until the middle of the nineteenth century

did the non-sectarian, secular public school emerge as the basic pattern of American education. This pattern was not publicly challenged until the end of the First World War. Then, religious forces, alarmed by the small numbers of youth who were receiving religious education, sought to establish a closer relationship between the State and religion through the medium of the public school.

This effort created two major issues: (1) To what extent, if any, is religious instruction permissible in the public schools? (2) To what extent, if any, may the state give aid to sectarian schools?

Religious Instruction in the Public Schools

There is little disagreement that outright sectarian instruction has no place in the curricula of the public schools. While only 12 states specifically forbid sectarian instruction by their state constitutions, it is clearly prohibited by the federal Constitution. The question remains, however, to what extent other practices which involve some relationship of the public schools to religious instruction is legal.

Bible Reading (including the recital of the Lord's Prayer and the singing of hymns):

Bible reading is required by law in 12 states—Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Massachusetts, New Jersey, Pennsylvania, Tennessee.

Bible reading is permitted by law in the following 7 states —Indiana, Iowa, Kansas, Mississippi, North Dakota, Oklahoma, South Dakota.

Bible reading is permitted by court decision in the following 7 states—Colorado, Michigan, Minnesota, Nebraska, New York, Ohio, Texas.

Among those states which either require or permit Bible reading, 8 states require that the reading be without comment —Arkansas, Florida, Idaho, Kentucky, Maine, Massachusetts, New Jersey, Pennsylvania. Seven states require that a pupil may be excused from attendance at the request of parents or guardians—Georgia, Idaho, Iowa, New Jersey, North Dakota, South Dakota, Tennessee. Two states require that the pupil

be excused from personal participation but not from attendance, at the request of parents or guardians—Kentucky and Massachusetts. In the 7 states where Bible reading is permitted by decisions of the courts, these decisions likewise require that the reading be without comment and that the pupils be excused from attendance where the parents or guardians request it—Colorado, Michigan, Minnesota, Nebraska, New York, Ohio, Texas.

Bible reading is not specifically forbidden by the constitution or statutes of any state. In 6 states, however, the language of the state constitutions, in excluding sectarian instruction, appears to require the exclusion of the Bible from the public schools—Arizona, California, Nevada, New Mexico, Utah, Wyoming. In 4 additional states, Bible reading in the schools has been forbidden by court decision—Illinois, Louisiana, Washington, Wisconsin.

Credit for Bible Study: Credit toward graduation for Bible study courses taken outside the public schools is provided in 6 states — Colorado, Indiana, Maine, Montana, North Dakota, West Virginia. An attempt to provide credit for Bible study was declared illegal in Washington.

Released Time: Released time is the practice by which pupils are excused during school hours to attend religious classes at the request of their parents. Those children whose parents have made no such request remain at school. In some communities, all the children are dismissed from school one hour early one day a week, and they are free to elect whether to go to religious class or not. This latter system is known as Dismissed Time.

Released time is authorized by law in 12 states—California, Connecticut, Indiana, Iowa, Maine, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, South Dakota, West Virginia. In addition, Illinois and Michigan permit the release of children between the ages of 12 and 14 who are attending confirmation classes. The typical "released time" law permits local school authorities to institute released time programs in their districts. In actual practice, released time

programs have been introduced even in school districts of states where there is no legislation permitting it, e. g. Illinois. Some estimates claim that as many as 46 states have released time or dismissed time programs. Proposed legislation that would require released time programs has recently failed of passage in Wisconsin and Washington.

Released time systems vary in the extent to which they avail themselves of school facilities and resources. The Supreme Court has recently declared that where the released time program is administered within the school it is unconstitutional. Short of the actual conduct of released time classes on the public school premises, however, it is not yet clearly settled what practices are unlawful.

Many communities have sought to establish a program completely divorced from the schools, except for the fact that religious classes are held on time that would otherwise be spent in school. In these communities, neither announcement of the program nor any control over attendance at released time classes nor any participation by school teachers or officers is undertaken by the public schools. This plan, which originated in Gary, Indiana, has been suggested as completely valid by the attorney-general of Wisconsin.

Beyond this minimum type of participation, many communities involve the public schools in the released time program in one or more of the following ways:

(a) the schools print and distribute literature advising the parents of the released time program and furnishing them with forms which they fill out and return;

(b) when time for religious class approaches, the schools separate the children according to their faith, and turn them over to their respective religious leaders;

(c) the schools transport the children to their religious classes at school expense or with the help of school personnel;

(d) the schools check and oversee the attendance of pupils at religious classes;

(e) the schools punish those children who have not attended religious class for which they are enrolled.

It is anticipated that many of these problems will ultimately be answered by the Supreme Court in test cases that are now pending in state courts. In some communities—Harrisburg, Pennsylvania and San Diego, California—released time has been abolished after unsuccessful trial periods. In Baltimore, Maryland, the school board rejected a petition to establish a released time program. In Washington, D. C. released time is forbidden.

Religious Garb in the Public Schools: The wearing of religious garb in the public schools has been outlawed by statute in Nebraska, North Dakota, Oregon and Pennsylvania and by court decision in New York. The practice is currently being challenged in the courts of New Mexico. The problem apparently has not arisen in other states.

State Aid to Sectarian Schools

As with religious instruction in the public schools, outright state aid to sectarian schools would violate the Constitution. Problems have arisen, however, with reference to the use of school buildings for religious purposes, furnishing free textbooks and free transportation to pupils in sectarian schools, and integration of sectarian schools into the public school system.

Use of School Buildings for Religious Purposes: In Illinois and Nebraska, school boards are permitted by law to allow religious meetings on school property when classes are not in session.

In Indiana and Iowa, such meetings can be held if a vote of the people in the school district favors such an arrangement.

In Connecticut, Kansas, Massachusetts, Missouri and Pennsylvania, the school building cannot be used for religious purposes without express statutory authority, and a favorable vote of the people in the school district will make no difference.

Free Textbooks: Statutes authorizing free textbooks for pupils of sectarian schools exist in Louisiana, Mississippi and New Mexico. Recently, a statute that would provide free

textbooks for sectarian school children was rejected in Oklahoma.

The Supreme Court has said that these statutes do not violate the Constitution because it is the children who benefit from the distribution of free textbooks and not the sectarian school. Nevertheless, in both Maine and New York, the distribution of free textbooks to pupils of sectarian schools is forbidden by court decision.

Free Bus Transportation: Statutes providing for free bus transportation for pupils of sectarian schools on the same basis as for public school pupils exist in California, Kentucky, Maryland, New Jersey, New York and Washington. Bills to provide free bus transportation for pupils of sectarian schools have recently failed of passage in Maine, Pennsylvania, Texas and Wisconsin.

Free bus transportation for pupils of sectarian schools has been declared illegal in Delaware, Iowa, Oklahoma, South Dakota and Wisconsin. In Washington, an early decision that free bus transportation for pupils of sectarian schools was illegal was superseded by a statute providing for this service. This statute is currently being challenged in the Washington courts.

In a recent case involving the New Jersey statute, the Supreme Court held that free transportation for pupils of sectarian schools does not violate the Constitution, but is a proper exercise of the state's power to provide needed services to all its school children. Reports indicate that free bus transportation for pupils of sectarian schools is also provided in Colorado, Kentucky, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Mexico, Ohio, Oregon, Rhode Island and Wyoming. In the wake of the Supreme Court decision, the practice in these states would appear to be legal, even in the absence of statutes expressly permitting it. It should be noted, however, that New Jersey's state constitution has no express prohibition against use of public funds to support sectarian institutions. In a state like New Mexico, where the

constitution does expressly prohibit such use of public funds, the decision might well be different.

Sectarian Schools as Part of the Public School System: In the nineteenth century, public schools would frequently rent space in church buildings. As this practice came to be popular, because it proved cheaper to the local school board than building a public school, many court cases were brought to test its legality. In Illinois, Tennessee and Texas, the courts found nothing wrong with the public school board renting space in church buildings, regardless of whether a sectarian school was being conducted. In Iowa, Kansas, Kentucky, Massachusetts, Missouri, South Dakota and Wisconsin, the practice was disapproved and declared illegal. In New York, the court decided that merely because a church owned the premises, in the absence of proof that it ran a sectarian school, there was nothing illegal in the public school board renting space.

More recently, particularly in rural areas, the school boards have made attempts to build the sectarian schools into the public school system. This effort has reached its climax in Ohio where proposals for the complete integration of sectarian schools within the public school system are being fought out in an atmosphere of much bitterness. Within recent years, legislation in Ohio that would make public funds directly available to sectarian schools has failed of passage.

Today, the question of state aid to sectarian education has become an important federal question. The Congress in recent sessions has been considering bills providing for federal aid to state education. Two of these bills provide, in different degrees, for the use of federal funds by the states in aid of sectarian schools.

Under one bill, introduced by Senator Taft, those states which currently provide benefits to sectarian schools are authorized to use federal monies in the same way. Thus, New York and New Jersey could use federal monies to help pay bus transportation costs of pupils attending sectarian schools.

Louisiana and Mississippi could likewise purchase textbooks for sectarian school children from federal funds.

A second bill would go even further in providing benefits to sectarian schools. This bill, introduced by Senator Aiken, would reimburse all schools, without restriction as to their being public or sectarian, up to 60% of their actual expenses in providing for transportation of pupils, school health examinations and health service, and the purchase of non-religious instructional supplies and equipment, including books. Under the Aiken bill, even in those states where the use of public funds for parochial schools is expressly forbidden, federal funds could be disbursed to sectarian schools by the Federal Commissioner.

Clearly, there is no uniform approach among the states to the problem of religious instruction in the public schools and state aid to sectarian education. Two states, with identical constitutional provisions, e.g. New Mexico and Wisconsin, will differ considerably in what is and is not permitted.

The Parent, the State and the Child

Separation of Church and State does not mean that the State can set obstacles in the way of religious education for children. In 1919, Iowa, Nebraska and Ohio passed laws forbidding the teaching of any subject by any person in private, sectarian or public schools in any language other than English. The teaching of foreign languages was prohibited until after pupils had attained the eighth grade.

The practice had existed in many denominational schools of teaching the mother tongue of the parents so that the children might better understand church services and might receive religious instruction from the parents. The laws were apparently designed to eliminate this practice.

The Supreme Court declared the laws unconstitutional. The Court pointed out that the state has the absolute right to prescribe the curriculum of the public schools, but that the state has no right to dictate the curriculum of private and denominational schools beyond prescribing a basic course of study. The Court stated that the laws, in forbidding classes

in a foreign language in private and sectarian schools, were an unreasonable interference with the right of control of parents over their children.

In yet another instance, the Supreme Court rejected a state law which was held to interfere with the right of parental control. In 1922, Oregon passed a law requiring the attendance of the children in the state at public schools. The law, which was to go into effect in 1926, required the closing of all private and sectarian schools. The Court, in declaring the law unconstitutional, affirmed the right of private and sectarian schools to exist and to solicit students and the right of parents to send their children to other than public schools. The State does have the right, however, to compel attendance at some school—either public, private or sectarian.

This, then, represents the extent of power of a state in providing for the education of its children. The state may require attendance either at a public, private or sectarian school. The state may provide for supervision and reasonable regulation of public, private and sectarian schools. The state may require the teaching of basic morality, good citizenship and the English language. The state must leave to the parents, however, the decision as to the type of school in which their children shall be educated and the type of education which they shall receive beyond the prescribed curriculum.

The State as the Friend of Religion

Public opinion has frequently become sensitive to the problem of irreligion, and this has been reflected, from time to time, in laws designed to protect or stimulate religious belief, without preferring one religion over another. The so-called "anti-evolution" laws enforced in 5 states—Arkansas, Florida, Mississippi, Tenessee and Utah—are of this type.

These laws make it unlawful to teach in the public schools any doctrine that man is descended from a lower order of animals. While the wording of the individual statutes differs, in general, they link the theory of evolution to a denial of the biblical story of the creation of man and to atheism.

In the one court case testing the validity of an "anti-evolution" law, a Tennessee court held it to be constitutional. The court stated that the law does not require religious teaching in the public schools, but forbids anti-religious teaching. The court further explained that its decision was limited to teachers in the public schools who were servants of the state. It did not pass upon the question whether the law, as applied to teachers outside the public school system, would be a violation of freedom of speech and thought.

"Anti-Evolution" Laws have been attacked on the grounds that they prevent the public school youth from making an informed judgment as to the validity of the theory of evolution. Moreover, it is argued strongly that the theory of evolution is neither atheistic nor a denial of Divine Creation. The laws have been defended on the grounds that the teaching of theory of evolution contributes to atheism among the youth. There has been no opportunity, as yet, for the Supreme Court to determine finally the constitutionality of these laws.

The Sunday "Blue" Laws likewise illustrate the role of the states as the friend of religion. Unlike the comparatively recent "anti-evolution" laws, Sunday legislation in this country dates back to colonial times. In fact, until recently, every state in the union had some legislation restricting work and activity on the Sabbath, although the measure of enforcement differed from state to state.

Today, Sunday laws are honored more in the breach than in observance, as sports, theatres, bars and other amusements have come to be legal on the Sabbath. Actually, Sunday laws have lost ground. Arizona, California, Oregon, Wisconsin and Wyoming have repealed the laws on their books, restricting activity on Sunday. All other states—with the exception of Arkansas, Delaware, Mississippi, South Carolina and Virginia—now authorize local communities to amend or repeal the Sunday laws by "home rule" action. Court decisions in Indiana, Kentucky, Michigan, Ohio and Oklahoma have laid down the rule that a person who observes Saturday as his Sabbath is exempt from the operation of Sun-

day laws. Where liberalization has become the rule, the only requirement is that whatever activity is undertaken not disturb others in their religious worship.

In place of the Sunday laws, legislation has been suggested which would merely require one day of rest in seven. Such laws have been enacted in California and New Hampshire. Completely devoid of any religious element, they aim to protect employees from seven days of work a week, leaving to the employer the right to determine which day shall be "off" for his employees.

ABSOLUTE FREEDOM TO BELIEVE; LIMITED POWER TO ACT

The exercise of religious liberty is guaranteed against federal interference by the First Amendment to the Constitution. It is likewise guaranteed against state interference by the "due process" clause of the Fourteenth Amendment to the Constitution and by the state constitutions of the forty-eight states. As to what this guarantee actually means, however, there is neither agreement nor uniformity among the states, except for the general conclusion that the individual has *absolute freedom to believe and to teach, but only limited power to act.*

Liberty of Conscience v. Citizenship

In general, the majority of Protestant sects, the Catholic Church and the Jewish faith render "unto Caesar the things that are Caesar's." Obligations of citizenship, such as saluting the flag or the bearing of arms in defense of the nation, are not considered to be inconsistent with religious conviction.

Certain religious sects, however, such as the Jehovah's Witnesses, forbid the salute to the flag on the grounds that it is idolatry. The Witnesses, Quakers and Seventh Day Adventists forbid the bearing of arms in defense of one's country. Persons adhering to the doctrines of these religious sects are faced with a sharp conflict between their religious conscience and the obligations of citizenship. In addition, many pacifists, as a matter of conscience, will not go to war.

Where religious belief or conscience clashes with obligations of citizenship, a legal issue is created.

Saluting the Flag: Most of the states have some laws designed to teach respect for the flag. There are requirements that the flag be displayed over or within public school buildings. Some states require flag programs and special instruction concerning the flag in the public schools. In approximately 12 states, there are varying provisions requiring that students salute the flag. These states are Arizona, Delaware, Idaho, Kansas, Maryland, Massachusetts, Nebraska, New Jersey, New York, Rhode Island and Washington.

The question has arisen under these laws whether a person whose religious scruples forbid saluting the flag can refuse to do so. Prior to 1943, state courts in Georgia, Massachusetts, New York and Pennsylvania, as well as the Supreme Court, held that religious conviction was not sufficient reason to justify refusal to salute the flag.

In 1943, however, the Supreme Court reversed its decision, holding that a child cannot be expelled from the public schools for refusing to salute the flag. The Court pointed out that a refusal to salute the flag that is based on religious conviction does not indicate disrespect for the flag. To compel a person to salute the flag against his religious scruples is an unreasonable exercise of state power.

Conscientious Objection to Military Service: Where freedom of religion conflicts with national safety and security, the courts have held that the constitutional protection must give way. Thus, while one may safely refuse to salute the flag for reasons of religious conviction, it is only by the grace of Congress that the duty to bear arms in defense of the nation may be altered or avoided.

To an increasing extent, the Congress of the United States has given official recognition, through the last two wars, to the religious beliefs or convictions of conscience of persons refusing to bear arms in defense of the nation. Under the 1941 Selective Training and Service Act, persons conscientiously opposed to participation in war, if their objection were

sustained by the local draft board, could be assigned to noncombatant service. Those opposed even to noncombatant service could be assigned to work of "national importance under civilian direction." In general, persons refusing both combatant and noncombatant service were assigned to civilian "C.O." work camps, which were administered with military discipline. Failure to report for induction either into the Armed Forces or into a "C.O." camp was a basis for prosecution, conviction and imprisonment.

Under the most recent draft legislation, assignment to "C.O." camp is eliminated. A person sustaining the fact that religious conviction bars him from military service is entitled to deferment. However, the legislation requires a belief in a Supreme Being to entitle a person to qualify for such deferment. Thus, atheistic pacifists are not protected. The legislative history reveals that this provision was included to prevent Communists from shirking military duty.

Another issue in connection with "conscientious objectors" has been the admission to citizenship of aliens, otherwise satisfactory, who declare their refusal to bear arms in defense of the Constitution. In 1929 and again in 1931, the Supreme Court reversed the granting of citizenship to persons who, because of pacifist or religious beliefs, stated that they could not take an oath "to defend the Constitution and laws of the United States against all enemies" where such defense required the bearing of arms. The Court stated that the right of an alien to become a citizen is not a natural, but a law-given right, and that citizenship must be denied to those who do not measure up strictly to the requirements for naturalization.

In 1946, the Supreme Court reversed these earlier decisions, holding that the oath to defend the Constitution does not specifically require the bearing of arms. Basic to the decision, however, is the premise that Congress could require an oath to bear arms, if it wanted to do so. In that event, the Constitution would not protect the refusal to take such an oath.

Peddlers of Ideas

We have seen that there is only a limited freedom to give expression to religious belief where it conflicts with the demands of loyalty to the nation and the government. The question remains—how free is a person to express his religious belief when either the belief or the manner of expression is offensive to other persons. The rules may be summarized through examining the following hypothetical situations.

In a private discussion among friends, Mr. X. makes offensive references to religions other than his own. There is no question of Mr. X's right, under these circumstances, to express his opinions.

In his efforts to win support for his particular religious views, Mr. X., at a public meeting place, makes remarks offensive to other religions. Offensive remarks about other religious groups cannot serve to convict a man of disorderly conduct unless what he says incites to riot or to a breach of the peace. The mere possibility of disturbance is not enough; to warrant prosecution, imminent or actual breach of the peace must be shown. In the absence of a clearcut breach of the peace, in the words of the Supreme Court, conviction is possible only under a

> "statute, narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." (From *Cantwell v. Connecticut,* 310 U. S. 296 at p. 311).

(For a discussion of narrowly drawn statutes, see ahead p. 38)

If, in the foregoing illustration, Mr. X. on being accosted by a police officer, uses abusive and profane language, he can be convicted of disorderly conduct. Neither freedom of religion nor freedom of speech includes the right to use language that is abusive and profane.

If Mr. X. expresses his religious views on a street corner, he cannot be prevented from doing so either by the police or by municipal ordance. If he were to distribute handbills on the streets, or ring doorbells soliciting funds for his religious cause, he could not be forbidden to do so. Moreover, he cannot be required to see a permit to distribute handbills.

Nor can he be made to pay a license fee or tax to sell pamphlets of a religious nature on the streets or by door-to-door canvass.

Mr. X. can be required, however, to register with the police for purposes of identification if he desires to solicit funds. This is regarded as a means of protecting the community against possible fraud. But he cannot be required to salute the flag as a condition of his distributing literature or soliciting funds.

If Mr. X. were to wage his campaign to win adherents to his religious views by means of a loud-speaker or sound-truck apparatus, in the latest view of the Supreme Court, he need not apply for a license. However, regulations as to time, place and volume of sound would be constitutional. The Supreme Court has not yet considered the question whether a municipality, instead of licensing sound trucks, may ban all of them regardless of their message or purpose.

If Mr. X. were to organize a religious parade through the streets of his city, without prior licensing from the authorities, he could be convicted of disorderly conduct. The obstruction of public passageways and thoroughfares can be forbidden by law enforcement authorities, and the licensing of parades, including police approval of the line of march, can be required.

If Mr. X. were to come uninvited into a hotel or privately owned establishment, insisting on making his opinions known to unwilling listeners, he could be convicted of disorderly conduct. Freedom of religion and freedom of speech do not include the right to interfere with another's enjoyment of his privacy.

Where freedom of religion conflicts with property rights, the freedom of religion is preferred. Thus, if Mr. X. were to carry on his speechmaking, handbill distribution or solicitation of funds on the streets of a company-owned town, he would be protected by the Constitution. Where privately owned property is thrown open to public use, the rules governing public property will apply.

If Mr. X., in expressing his religious opinions, advocates the doing of something that is against the law, he may be prosecuted and convicted. But the law under which he is prosecuted must be specific and definite. The Supreme Court recently reversed the conviction of a group of Mormons who had advocated polygamy in one of their publications. The case was sent back to the Utah courts to consider whether the law under which they had been prosecuted was "vague and indefinite." The Court has previously held that for Mormons to cross state lines with their plural wives violates the "White Slave" Act. Religious belief is no defense to violation of the law.

These illustrations point up the rules formulated by the Supreme Court in setting the metes and bounds of freedom of religion. Actually, these same rules apply under similar circumstances to the exercise of freedom of speech, press and assembly, even where religious belief is not involved. They point to the freedom of the "peddler of ideas" from taxes, licenses and discriminatory administrative regulations.

FREEDOM OF SPEECH, PRESS AND ASSEMBLY

There is no absolute right to express onesself. But it is fair to say that freedom of speech, press, assembly and religion are preferred liberties. To understand how they work, one must understand the underlying philosophy of freedom of expression in a democratic society.

There is a market place of ideas where, like goods, ideas may be bought and sold. This market is governed by free trade. Any idea may be expressed, and it will be driven from the market only by its own failure to win a following.

But, just as law operates to forbid unfair practices in selling goods, so it has the task of protecting the consuming public against these practices in the sale of ideas. Thus, fraud and untruth have never been protected in the name of free speech. Neither the First Amendment nor the Fourteenth Amendment is a defense to prosecution for fraud or to civil or criminal suits for libel or slander. Only truth, or the reasonable belief that what one has said is true, is relevant in de-

fense. (The law of Libel and Slander is treated in Legal Almanac Series #15.)

Moreover, utterances that are not part of the expression of an idea are not really "speech" and therefore do not enjoy the protection of the Constitution. Lewd, obscene, insulting or blasphemous utterances, when they are made solely for their own sakes, and not to get across an idea, can be punished by law. In fact, the major issue involved in censorship of books, films and other reading or seeing matter is the point at which the written or spoken word ceases to be the expression of an idea and becomes outright smut.

Beyond fraud, libel and slander, and obscenity, freedom of speech, press and assembly may be limited only under very special circumstances. As with the freedom of expression of religious belief, they can never be totally prohibited in advance; nor can they be subjected to licensing or tax. Where, however, there is a clear and present danger that what is uttered will create a situation with which the state has power to deal, regulation, if specific and definite in character, is permissible.

Thus, if a man advocates the overthow of the government, he can be prosecuted under a Criminal Syndicalism Act if there is a clear and present danger that his words will lead to an actual or attempted overthrow of the government. If a man advocates hatred or violence against a particular person or group, he may be prosecuted for disorderly conduct or under "race hate" laws if there is a clear and present danger that his words will cause a breach of the peace.

In the following pages, these issues will be reviewed in the context of this philosophy and these principles: (1) censorship laws and the machinery of censorship; (2) the "clear and present danger" of subversive activities; (3) un-American activities and loyalty investigations; (4) free speech and the rights of labor.

"Banned in Boston"—and Elsewhere

Indecency, obscenity, lewdness—all are forbidden by the criminal codes of the forty-eight states. Moreover, as we

have seen, the Constitution does not protect utterances that are indecent, obscene or lewd; they are not part of the "exposition of an idea."

But one may ask, "What has this to do with censorship?" The typical state law, for example, provides for fine and imprisonment of a bookseller or publisher of a book or magazine that is "obscene, indecent or impure, or manifestly tends to corrupt the morals of youth." The typical state law likewise provides for fine and imprisonment of a producer or actors of a theatrical production that is "lewd, obscene, indecent, immoral or impure." Censorship would seem not to be involved. A book or play makes its way into the market, and if it is thought to be a violation of the "obscenity" law, criminal prosecution may follow.

The question is as to what is "lewd, obscene, indecent, immoral or impure." Censorship comes into the picture because the average bookseller or theatrical producer does not want to risk his own judgment leading him into criminal prosecution under a state "obscenity" law. Resultant fine and imprisonment would destroy his reputation and put him out of business. He wants to know in advance whether his product is consistent with good morals and decency.

Accordingly, across the country, either the mayor of a city, or his delegate, or the licensing commissioner, or the police commissioner, or private "decency" organizations or religious organizations undertake, in some instances by law, and in other instances by custom, to censor and to ban—in short, to tell the citizenry what they may read or see and what they may not. As it is applied respectively to theatrical productions, books and magazines, motion pictures, radio and the mails, here is the way that censorship works.

Theatrical Productions: The staging of an "obscene" play leaves the producer and the actors liable to criminal prosecution. The theatre in which such a play is housed, moreover, runs the risk of losing its license.

Frequently, actors are willing for prosecution, content in the knowledge that a jury will not convict. Producers and

theatre owners, however, with much more to lose in terms of financial investment, are seldom willing to risk prosecution. The mere threat of prosecution is usually sufficient to get them to take a play off the boards, the feelings of the actors notwithstanding.

This means that the real enforcement of a morality code rests not with a jury in a criminal proceeding after a play has been presented, but with an official censor who may ban it in advance of presentation. Such an official dramatic censor operates in Boston. In New York City, the licensing commissioner operates as censor, sometimes, as in the days of Mayor La Guardia, with the vigilant assistance of the mayor. In other cities, the police commissioner is the guardian of public morals.

In this scheme of things, the state laws become almost inoperative. Municipal enforcement by advance censorship becomes the rule.

Books and Magazines: Plays, burlesques and other forms of entertainment have generally been regarded by the courts as not involving the issue of freedom of expression. This has been true despite the fact that it is a very thin line that separates "entertainment" from "exposition of an idea," particularly in the serious play that may deal with sex or morals in an unorthodox way.

Where books and magazines are involved, however, the issue of freedom of press is clearly posed, and advance censorship becomes doubtful. An influential publisher will frequently risk criminal prosecution, knowing that his mass volume business will not suffer too greatly if he goes to bat for a particular book. Moreover, if he wins, the fact that a book has become controversial will establish it as a best seller. For the publisher, the risk of criminal prosecution may be good business.

For the bookseller, however, criminal prosecution presents the same risk encountered by the producer of an "obscene" play. Successful criminal prosecution can put so great a drain on him that he can be put out of business. Accordingly,

booksellers have sought some means of advance clearance of books in order to avoid these risks.

Out-and-out censorship of books and publications would violate freedom of press. Censorship, therefore, is nowhere authorized by law. However, in many communities, either the District Attorney, the police, private organizations concerned about decency, the booksellers themselves or all four collaborate to determine in advance what publications shall be "prohibited." The word, "prohibited," is used advisedly since a bookseller who violates the informal ban would leave himself wide open to criminal prosecution. There is, of course, no appeal from the decision of informal censors.

A law passed in Massachusetts, at the instigation of the booksellers themselves, attempts to provide for official censorship, yet within the bounds of the Constitution. Instead of a criminal prosecution against a book seller, the Massachusets law affords the alternative of a civil proceeding against the book. Since such a suit asks a court injunction against the distribution of a particular book, the suit is one in equity, and there is no trial by jury. Trial is by a judge, and the judge thereby becomes the censor. If he finds the book to be "obscene," no bookseller will distribute it. For distribution would mean criminal prosecution.

Of course, the opinion of the judge, unlike that of the informal censor, can be appealed. But this is an expensive procedure, and an appeal court will reverse a finding that a publication is "obscene," only if it feels that the judge in the lower court acted arbitrarily. Since what is usually involved is the exercise of personal judgment, it is rare that an appeal court will reverse. In one recent case, that of the successful criminal prosecution of a bookseller of Lillian Smith's "Strange Fruit," the issue of "obscenity" was taken all the way up to the Supreme Court of the United States. The Court saw no threat to freedom of the press and refused to reverse the Massachusetts court's finding of fact that the book was obscene.

Where, however, the court issue posed is the constitutional-

ity of a state law, and not merely the correctness of finding of fact, the Supreme Court makes a more intensive review. Thus, a New York law punishing publications largely devoted to stories of "bloodshed, lust and crime" was declared unconstitutional, as an unwarranted interference with freedom of press.

Motion Pictures: As with theatrical productions, the tendency of the courts has been to view movies as entertainment, not involving an issue of freedom of press or speech The movie industry does its own preliminary screening through the well-known Hays Office. Through this Office, pictures are reviewed with an eye to preventing the distribution of obscene, indecent or immoral vehicles.

But once a picture gets past the Hays Office, it must still satisfy state boards of censors in seven states—Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania and Virginia —and the censors of many municipalities—for example, Boston, Chicago, Memphis, Atlanta, San Francisco, Philadelphia, Pittsburgh. In New York City, the Licensing Commissioner has the power to ban a movie or its advertising, even after the picture has gotten by the State Board. Connecticut repealed its movie censorship law in 1927. The movie censorship law in Florida was held unconstitutional in the lower courts of the state.

The state and municipal censors do not limit the "ban" to matters involving obscenity or indecency. Memphis has banned five separate films on the grounds that they undermine the southern doctrine of "white supremacy." Chicago banned "The Great Dictator" because the censor feared offense to Chicago's German-speaking population. Ohio and Kansas have banned pro-labor documentaries. Even newsreels have been banned by some boards of censors, although newsreels and political addresses on the screen are exempted from censorship in Kansas, New York and Pennsylvania.

The appeal to the courts from an order of a censor is a very narrow one, and has proved completely futile in practice. The Supreme Court has not been called upon to determine

the constitutionality of movie censorship since 1915. At that time, the Court decided that movies were strictly entertainment and not within the orbit of constitutional protection.

With the growth of the motion picture as a medium of expression on significant social and world problems, there are many who question whether movie censorship is not an unconstitutional violation of freedom of expression. A recent decision by the Supreme Court on monopolistic practices of motion picture producers mentions that freedom of speech and press do apply to movies. Test cases are now being prepared.

Censorship on the Federal Level: Censorship on the federal level operates in three major areas: (1) radio; (2) the mails; (3) import of foreign reading matter.

Radio: The Federal Communications Commission licenses the operation of radio stations. Since there are many more applicants for radio frequencies than there are frequencies, in granting or renewing a license, the FCC must make a choice between competing applicants.

In setting minimum standards for a radio station licensee, the FCC, in addition to its technical and operational requirements, prescribes a basic program code that may be summarized as follows.

a. Monopoly is discouraged. While a newspaper may be granted a license to operate a radio station, it will not be granted a license where the combined radio and newspaper control would give a communication monopoly in a community.

b. Nothing obscene or indecent may be uttered over the airwaves. An indecent remark leads to immediate cut-off of a program and subsequent suspension of the offender for a stated period of time.

c. On controversial issues, where a station has given radio time to one point of view, it must provide, when requested to do so, an equal amount of time to the opposing point of view. In general, the FCC favors free time to both sides in the presentation of a controversal issue.

d. A station owner may not use his station to express his

own views on controversial issues. The FCC has rejected the argument that a station owner should have the same right to express his views as a newspaper publisher. The FCC points out that while newspapers are private enterprises, radio stations are licensed by the public.

e. In the granting or renewal of a license, the FCC will take into consideration the record of an applicant or station operator with respect to his fairness of approach to the various ethnic and social groups within the community. Stations sponsoring or allotting program time to "hate" groups or deliberately excluding a pro-labor point of view from the air run the risk of losing their licenses, when they come up for renewal.

Mails: By federal law and by post office regulations, obscene or fraudulent matter is barred from the mails, as is the use of the mails to conduct a lottery or to engage in other specified unlawful activity. In addition, matter which violates the provisions of the federal Espionage Act (see ahead page 28) is also barred.

Where the mails are being used to carry obscene publications or as a means of fraudulent representation, the Post Office may either exclude such publications totally from the mails, or where the publisher or distributor enjoys a second class mailing privilege, may revoke this privilege. In the past, where matter has been banned from the mails, there has usually been no hearing; where revocation of second class mailing privilege is involved, there has generally been a hearing before the postal authorities.

Since the attempt to mail forbidden matter is a criminal offense, post office action, at one and the same time, may ban a particular item from the mails, and by so doing, render the party that sought to mail the item criminally liable. Here, censorship does not prevent the risk of criminal prosecution, but creates it.

Up until quite recently, there was only a very narrow court review of the actions of the postal authorities In the "Esquire" case, however, substantial inroads were made on

Post Office censorship. The Post Office had sought to deny the second class mailing privileges of Esquire Magazine, chiefly on the grounds that it did not contain information of a public character.

The case was taken up to the Supreme Court which decided that the authority of the Post Office nowhere includes the right to revoke mailing privileges because a publication does not contain information of a public character. The revocation of Esquire mailing privileges was reversed, the Court holding that the Post Office may no longer deny second class mailing privileges because of the contents of a publication. It may, however, after hearing, declare particular issues of publications, books or pamphlets non-mailable.

At about the same time that the "Esquire" case was in the courts, orders barring from the mails a publication on birth control and another on sex adjustment in marriage were reversed by federal courts. Since the "Esquire" decision, the Post Office has been very cautious in the exercise of its power to ban on grounds of obscenity. However, mail fraud orders continue to be issued wherever the postal authorities feel that matter being mailed contains exaggerated claims. (The subject of false advertising is beyoud the scope of this work).

Import of Foreign Reading Matter:

The Customs Bureau exercises preliminary power in screening foreign produced reading matter and films for obscenity or for advocating or urging treason, insurrection or forcible resistance to any law of the United States. However, customs inspectors to not have the final decision. Court proceedings are required to confiscate or destroy a book for obscenity or other stated reasons. Either party can demand a jury trial.

Fair Comment v. Contempt: Since the famed trial of Peter Zenger, the New York printer, for sedition in colonial times, the freedom of newspapers from restriction has been synonymous with freedom of the press. As a result, attempted censorship of newspapers has never been extensive. The

major issue has revolved around devices for preventing hostile newspaper criticism of public officials.

A Minnesota law of 1925, known as the "Minnesota Gag Law", provided for injunction against malicious, scandalous, defamatory and obscene newspapers, magazines and publications. Truth was a defense only if matter was published with good motives and for justifiable ends. Injunction could be granted not only against objectionable issues of newspapers or publications but could completely stop a newspaper or publication from publishing. The Supreme Court invalidated this statute as an improper interference with freedom of the press.

The Supreme Court likewise struck down a more subtle attempt at press censorship by Huey Long in Louisiana. He sought to impose a 2% tax on the gross receipts of newspapers selling ad space and having a circulation of more than 20,000 per week. The law was aimed at the larger newspapers which were opposed to the Long administration. The Court held the law to be a violation of freedom of press as well as unlawful discrimination against the larger newspapers in Louisiana.

Contempt proceedings have been the most effective device for dealing with criticism of public officials, particularly judges. A newspaper editor or publisher, fearful lest criticism of official action might lead to criminal prosecution, would be extremely cautious in his handling of news and issues involving court cases.

In recent years, the Supreme Court has completely liberalized the law applicable to contempt proceedings. Unless the criticism creates a "clear and present danger" to the fair and orderly administration of justice, it cannot be punished summarily for contempt. The Supreme Court, in urging judges to be less sensitive to criticism, estimates that judges have too much stamina to yield to unseemly pressures.

Under the rules governing contempt, critical comment after a proceeding is concluded can never be punished, because there is no interfrence with the proceedings which can result

from the criticism. As to comment made while proceedings are in progress, only comment specifically intended to influence and capable of influencing the jury, or implying a threat to the judge or jurymen, or inciting public opinion against the judge or jury with specific intent to influence their judgments may be punished.

Subversive and Seditious

A revolution has swept a great European power, and in its wake have come terrorism, dictatorship and war—a war in which the United States appears destined and certain to participate. Yet, on our shores, revolutionaries, agents of foreign powers, and native trouble-makers are speaking out against the government and its policies, kindling the sparks of discontent and internecine strife.

No, the year is not 1939, nor 1949, but 1798. Against this background, the Federalist-dominated Congress of John Adams passed the first Alien and Sedition Act in this country. The Alien Law authorized the President to deport aliens whom he judged to be dangerous to the peace and safety of the United States. The Sedition Law punished false, scandalous writings against the government or any of its arms, if published with intent to defame or to excite hatred.

These measures were enacted at a time when this country was not actually at war. History records that they aroused powerful popular indignation which all but destroyed the Federalist Party. With the advent of Thomas Jefferson to the presidency, those imprisoned under the Sedition Law were pardoned and all fines collected were eventually repaid.

In our times, the first important Sedition Act was the Espionage Act of 1917, passed after our entry into the First World War. During the twenties, the pattern of prosecution for sedition in wartime was carried over to peacetime through anarchy, syndicalism and sedition laws of the states. Then, in 1940, a federal peacetime sedition law was passed for the first time since 1798. This was contained in the Alien Registration Act of 1940, sometimes called the

Smith Act. The provisions of these laws, their application and their constitutionality will be treated in this section.

War Measures: The Espionage Act of 1917, which is still on the books and applied in the Second World War as well as the First, defines three wartime offences: (1) the willful utterance of false statements with intent to interfere with the operation or success of the armed forces of the United States; (2) the willful causing of or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the armed forces of the United States; (3) the willful obstruction of the recruiting or enlistment service of the United States. Penalties of fine of not more than $10,000 or imprisonment for not more than twenty years or both are provided. (An Amendment to this Act, passed in 1918, added nine additional offenses. The Amendment was repealed in 1921).

The enforcement of these provisions of the Espionage Act differed widely in the two world wars. In the First World War, there were hundreds of prosecutions of persons who raised their voices against the draft and against the war. Many publications were banned from the mails and their second class mailing privileges revoked for similar utterances. In general, the courts took the position that an utterance did not have to create a "clear and present danger" to the war effort; it was sufficient if the utterance created a "dangerous tendency." Moreover, willful intent was presumed from the speech or writing. Under these tests, conviction followed almost inevitably on prosecution.

In the Second World War, there were relatively few prosecutions under the Espionage Act. Generally, they were limited to prosecutions of members of certain Negro sects for conspiring to obstruct the operation of selective service, to members of the German-American Bund and to organizations and members of organizations professionally anti-Semitic, anti-government and pro-Axis.

The government and the courts took action only where there was actual incitement to violation of the law or where there was a "clear and present danger" that the illegal action

urged would be taken. The Supreme Court, in the two Espionage cases which it reviewed, reversed convictions—in one case, of 28 German-American Bund leaders who had advised their members to resist certain provisions of the 1940 Draft Act which were alleged to discriminate against Bund members—in the second case, of a Chicago pamphleteer who had prepared and distributed mimeographed circulars which discouraged recruiting and enlistment. This latter case most certainly would have been decided the other way in World War I, indicating that the government gave much greater latitude to freedom of expression in the Second World War than in the First.

The Federal Peacetime Sedition Act: The Alien Registration Act of 1940 (Smith Act), to a greater extent than the Espionage Act, posed the major issues involving sedition in the Second World War. As observed previously, this law was the first peacetime Sedition Law to be enacted by Congress since 1798.

Section I of the Act makes the Espionage Act applicable in peacetime. Section 2 enumerates the following offenses: (1) willfully advocating the overthrow of government in the United States by force or violence; (2) willfully issuing any written or printed matter so advocating; (3) to organize any society, group or assembly of persons who so advocate; (4) to become a member of or affiliate with any such society, group or assembly, knowing its purposes. Section 3 makes it unlawful to attempt or conspire to commit the prohibited acts. The penalty is fine up to $10,000, imprisonment up to 10 years, or both.

The most significant wartime case involving the Sedition Act was the prosecution for seditious conspiracy brought in the federal court of the District of Columbia against some 29 leaders of alleged pro-Nazi movements. (This is not the Bund prosecution, mentioned above). The action was begun in 1942 under both the Sedition Act and the Espionage Act. The court threw out the "Sedition" indictment on the grounds that the Sedition Act could not punish conduct prior to 1940.

The "Espionage" charges were dropped because the government was unable to uncover evidence of illegal activities after this country had gone to war.

In 1944, new indictments were brought, charging conspiracy on behalf of the German government to undermine the morale of the armed forces. Upon the death of the presiding judge in 1945, prosecution was not resumed and the proceeding lapsed.

A case only slightly less celebrated was the prosecution of the Socialist Workers Party (Trotskyites) and the CIO Teamsters' Union in Minneapolis on the charge that they advocated the overthrow of the government by force and violence. The prosecution rested its case on writings advocating the overthrow of the government contained in Party publications. A Workers Defense Guard, created to protect union property against destruction, was charged with being the organized means through which the attempt to overthrow the government was to be made. Although this second charge was subsequently dismissed, convictions of 18 of the persons prosecuted were secured.

Notwithstanding the fact that the case posed the issue of the constitutionality of the first federal peacetime sedition act since 1798, the Supreme Court refused to review the convictions. The lower courts rejected the argument that the prosecution should be dismissed because there was no "clear and present danger" of overthrow of the government by this group. They held that the federal statute, by specifically making it a crime to advocate overthrow of the government by force and violence, has rendered the existence of a "clear and present danger" immaterial.

Today, the 1940 Sedition Act is back in the headlines. Eleven Communist leaders have been indicted and are being tried in New York federal court for advocating the overthrow of the government of the United States by force and violence and for conspiring to that end.

State Sedition Laws: Prior to World War I, most of the states of the union contented themselves with statutes speci-

fying the common law offenses of "riot," "unlawful assembly," "breach of the peace," and "disorderly conduct." The common denominator of each of these offenses is conduct of an individual or group which threatens an immediate disturbance of the public peace or an immediate violation of the rights of others. In other words—conduct which creates a "clear and present danger" of an evil which the state has the power to regulate

With the coming of World War I, however, the states turned increasingly to laws which would punish utterances as well as acts. During the First World War, many of the states supplemented federal legislation with espionage acts of their own, often substantially more stringent. A Minnesota statute, for example, made it unlawful to say that men should not enlist in the armed forces of the United States or that residents of Minnesota should not aid in carrying on war with our enemies.

Similar laws were passed in Florida, Iowa, Louisiana, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, Texas, West Virginia and Wisconsin.

In the aftermath of World War I, the increasing hostility to Radicals reinforced this mood and led to the passage of a rash of state sedition laws, designed to limit the freedom of expression of these groups in peacetime. The statutes include: (1) red flag laws; (2) criminal anarchy, syndicalism and sedition laws; (3) laws directed against Communists and the Communist Party.

RED FLAG LAWS: These are the simplest of sedition laws, forbidding the display of red flags or other insignia symbolizing sympathy with ideals, institutions or form of government antagonistic to that of the United States or as a stimulus to opposition to organized government. The penalty is generally six months imprisonment, or fine up to $1,000 or both.

Red flag laws exist in 30 states—Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Montana, Nebraska, New

Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin. The New York courts declared the New York law unconstitutional in 1934. Part of the California law was held invalid by the Supreme Court. Laws in Kentucky and Massachusetts were repealed. (For a discussion of the validity of Red Flag laws, see ahead page 34).

ANARCHY, SYNDICALISM AND SEDITION LAWS: Criminal Anarchy Acts, modeled after the New York Act of 1902, read much like section 2 of the 1940 federal Sedition Act. They make it a felony to advocate or teach the overthrow of the government of the United States by force and violence or to join or affiliate with any group or society so advocating. The penalty provided is fine of not more than $5,000, imprisonment for not more than 10 years, or both.

The New York Act has been adopted in Washington and Wisconsin. The New Jersey Criminal Anarchy Act is similar, the penalty being $2,000 fine, 15 years imprisonment, or both. The Massachusetts and Vermont anti-anarchy acts are less broad. They punish advocating the following: assault on a public official, killing any person, unlawful destruction of property, overthrow of the state government by force or violence. The penalty is $1,000 fine, 3 years imprisonment, or both.

The Criminal Syndicalism Acts go somewhat further than the Anarchy Acts. These laws make it a criminal offense to advocate the commission of crime, sabotage or unlawful acts of violence as a means of accomplishing a change in industrial ownership or control, or effecting any political change. Membership in an organization dedicated to these purposes is likewise a criminal offense. The penalty is generally fine of $5,000, imprisonment up to 10 years, or both.

Under the Syndicalism Acts advocacy need not be expressly in terms of overthrow of the government by force and violence; one may advocate less than the overthrow and still be guilty of

criminal syndicalism. This type of law exists in 16 states—California, Idaho, Iowa, Kansas, Kentucky, Michigan,, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Washington. Arizona and Oregon repealed their Syndicalism Acts. Washington is the only state which has both an Anarchy and Syndicalism Act.

In addition to either Anarchy or Syndicalism Acts, Iowa, Kentucky, Michigan, Montana and New Jersey have Sedition Acts which are broadly directed against all radical and subversive utterances, not only those advocating the overthrow of the government by force or violance. In Iowa, Michigan and New Jersey, the penalty for sedition is less than for criminal anarchy or syndicalism. In Montana, the penalty for sedition is greater than for syndicalism.

Sedition Acts are also on the books of Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Louisiana, New Hampshire, New Mexico, Pennsylvania, Tennessee and West Virginia. The New Mexico courts declared that state's Sedition Act unconstitutional in 1921.

In some states, the effect has been to limit the definition of criminal offense to incitement to or advocacy of specific unlawful acts. For example, New Jersey punishes advocacy of unlawful destruction of property or injury to persons. Georgia punishes incitement to insurrection. This type of law does not seek to legislate radical doctrines as opinions, but against incitement to specific criminal acts. This type of law exists in 8 states—Connecticut, Florida, Georgia, Illinois, Maryland, New Jersey, North Carolina, Tennessee. Of these states, Connecticut, Illinois, New Jersey and Tennessee have Sedition Acts in addition.

LAWS DIRECTED AGAINST THE COMMUNIST PARTY:

Barring the Communist Party from the ballot:

Arkansas, California, Delaware, Illinois, Indiana, Ohio, Pennsylvania, Tennessee, Wisconsin. Most of these bills were enacted in 1940 and 1941. In 1942, the exclusion of

Communists from the ballot was successfully challenged in the courts of California, Illinois and New York.

Exclusion from Public Employment:

The Civil Service Commission excludes Communists from federal jobs, and through the administration of President Truman's loyalty program, Communists presently in government service are being removed. Among the states, New York and California have enacted legislation excluding Communists from public posts. A law passed this year in New York excludes Communists from teaching in public schools.

Refusal of Public Buildings for Meetings:

New York this year passed a law forbidding the use of public school buildings to Communists. A California law, requiring an oath of loyalty as a condition of obtaining a meeting permit for a public school building was held unconstitutional by the California Supreme Court in 1946. In the fall of 1947, Communist meetings as well as meetings of the Henry Wallace Third Party were barred in Trenton and Newark, New Jersey.

The Constitutionality of State Sedition Laws: In general, a state sedition law is neither constitutional nor unconstitutional on its face. The facts in a particular case will determine whether the law can properly apply. The following illustrations will point up some of the rules.

Red Flags: X, supervisor of a Communist summer youth camp, orders that the red flag be raised to the camp flagpole each day. X is indicted and convicted under the Red Flag law. *Held,* conviction of X for merely displaying the red flag as a symbol of opposition to organized government or to the government of the United States must be reversed Where the display of the flag neither stimulates nor is intended to stimulate anarchy or sedition, it is a violation of the Fourteenth Amendment to forbid such conduct.

Party Membership: Y, a member of the Communist Party, helps to organize and speaks at a meeting sponsored by the Party, protesting police mishandling of strikers in a labor dispute. He is indicted and convicted under

a Criminal Syndicalism law on the grounds that the Communist Party advocates the overthrow of the United States government. *Held,* conviction must be reversed. The question which the court must ask itself is not "who is running the meeting?" but "what is its purpose?" It must determine guilt not on the basis of the company that a defendant keeps, but on the basis of whether what he says is unlawful. Mere membership in the Communist Party and participation in a Party meeting that is for lawful objectives and peaceably assembled cannot furnish the basis of a conviction for criminal syndicalism.

Possessing Seditious Literature: Z, a Communist organizer, is taken into custody with a supply of pamphlets and books advocating political and economic changes. He is indicted and convicted for inciting to insurrection. *Held,* in the absence of evidence, that these pamphlets were in fact used to attempt to foment an insurrection; conviction must be reversed. The mere possession of such literature, even with intent to distribute it, where there is no "clear and present danger" of realizing what is advocated, is insufficient grounds for conviction.

A similar result was reached in Oklahoma in a prosecution under the Criminal Syndicalism Act. Mere possession and distribution of Communist Party literature was held not to furnish a basis for conviction. It appears, however, that convictions under narrowly drawn statutes, such as inciting to specific acts in violation of the law, can be secured where the defendant has in his possession, with intent to distribute, literature advocating illegal action. The chief requirements for conviction laid down by the Supreme Court are (1) that the law specifically define the forbidden conduct; (2) that the action of the defendant create a "clear and present danger" of an evil which the state has the power to legislate.

Summary of State Sedition Laws: It is clearly constitutional to punish the open and direct advocacy of assassination, sabotage, destruction of property and other violent and unlawful conduct.

It is probably not constitutional to convict a person under

a sedition law for nothing more than membership in an organization which, as part of its program, advocates violent action. There should be some evidence of affirmative personal support for violent action to warrant conviction.

It is probably not constitutional to convict a person under a sedition law for possessing and distributing literature of an organization which, as part of its program, advocates violent action, where the literature involved does not itself advocate either violence or unlawful acts.

It is still an open question whether it is constitutional to convict for peaceable advocacy of remote objectives, presently illegal. The answer might well depend on whether the accused seeks to achieve his objectives by evolution or revolution.

Deportation and Denaturalization: — Another method of dealing with "subversive" activities has been through revocation of citizenship and expulsion from this country of foreign-born persons whose political convictions are thought to be inconsistent with American constitutional government. Since Congress has the exclusive power to regulate the entry and deportation of aliens to this country and to provide for the naturalization of aliens, until recent years, the exercise of this power had not been successfully challenged.

Under the immigration law, all anarchists or persons who advocate the overthrow of the government by force or violence are excluded from admission to the United States. Of course, prior to the time that a person enters this country, he is not entitled to the protection of the Constitution, and therefore the exclusion of an alien for any reason specified in the immigration law is permissible and raises no problem.

The immigration law also provides for the deportation of an alien who prints, publishes or distributes matter advocating the overthrow of the government by force or violence or who is a member of or affiliates with an organization which prints, publishes or distributes such matter. This provision was challenged by Harry Bridges, west coast labor leader against whom an order for deportation had been issued on the grounds of membership in the Communist Party. While the Supreme Court

reversed the order for deportation, it did so on the grounds that the Department of Justice had failed to identify Bridges as a member or affiliate of the Communist Party. There was no determination as to whether the Communist Party does advocate the overthrow of the government of the United States, and no clearcut holding that, in the absence of a clear and present danger, an alien falling within the letter of the law could not be deported.

In proceedings for revocation of citizenship, however, the Court has clearly made the provisions of the First Amendment applicable. Under the naturalization law, citizenship will be granted only to persons who have demonstrated their attachment to the principles of the Constitution. (See above page 14). Moreover, if at any time during the ten year period prior to filing of petition for naturalization, the alien was an anarchist or advocated the overthrow of the government of the United States by force or violence or belonged to any organization which printed, published or distributed matter so advocating, he is ineligible to citizenship. Where there is evidence that the certificate of citizenship was procured by fraud or otherwise illegally, citizenship can be revoked. (The law of naturalization is treated in Legal Almanac Series No. 8).

Prior to 1943, the courts generally upheld revocation of citizenship where, at the time the proceedings were brought, the naturalized citizen belonged to an organization assumed to be subversive, i.e. advocated the overthrow of the government of the United States. The line of reasoning was as follows: (1) even where resort to or advocacy of force or violence is not involved, such beliefs belie attachment to the principles of the Constitution; (2) such beliefs must have existed at the time that citizenship was applied for, and therefore failure to divulge these sentiments was equivalent to securing citizenship by fraud; (3) a naturalized citizen may be presumed to hold such beliefs when he is a member of an organization which espouses them.

Actually, this reasoning created two classes of citizens. While an American-born citizen could not be convicted for sedition on the basis of "guilt by association," a foreign-born natural-

ized citizen could be deprived of his citizenship and thereby become liable for deportation on the basis of "guilt by association." Moreover, the views held by a naturalized citizen years and sometimes decades after his naturalization were presumed to be his "secret" views at the time he became a citizen.

This double standard of citizenship was rejected by the Supreme Court in 1943. Revocation of citizenship can now be accomplished only where the Department of Justice proves actual fraud in the procurement of citizenship and personal convictions on the part of the naturalized citizen which create a "clear and present danger" of public disorder or to American institutions. This test would also appear to govern the granting of citizenship to persons seeking naturalization.

The Right to Hate: — Sedition laws are designed to curb utterances which are hostile to the state and which constitute a threat to organized government. Within recent years, in the interests of peace within the state among the many diverse ethnic, racial and religious groups, several of the states have sought to outlaw utterances and organizations which promote ill-will.

These laws take two general forms: (1) Criminal Libel laws empower the Attorney General of a state to prosecute those who, with malicious intent to promote hatred, issue false written or printed material about particular ethnic, racial or religious groups in the community. Truth is a defense. (2) "Race Hate" laws punish the incitement to or advocacy of hatred against particular ethnic or religious groups in the community. In a sense these laws represent attempts by the states to meet the Supreme Court standard of narrowly drawn and specifically defined legislation.

State laws of these types exist in Illinois, Indiana, Massachusetts, New Mexico and New Jersey. The New Jersey law was declared unconstitutional in 1942 for being too vague and indefinite.

More limited laws operate in other states. In California, textbooks may not contain and teachers, in giving instruction, may not say anything reflecting on United States citizens because of their race, color or creed. Florida prohibits the publi-

cation of anonymous literature and Connecticut forbids advertisements exposing religious groups to hatred, contempt or ridicule. West Virginia makes it unlawful to exhibit a motion picture or theatrical act in a place of public amusement which reflects injuriously upon any race or class of citizens. Oregon requires the Secretary of State to reject for printing in the "voters pamphlet" any election campaign literature which is libelous of racial or religious groups or advocates hatred for reasons of race, color or creed.

Special statutes directed against the Ku Klux Klan and similar groups exist in New York, North Carolina, Ohio, Texas and Washington. KKK Charters have been revoked by the courts in California, Kentucky, New Jersey, New York and Wisconsin. California has a law requiring the registration of subversive organizations.

Investigations of Loyalty and Un-American Activities

Notwithstanding the existence of extensive state sedition codes and the peacetime federal Sedition Act of 1940, the major methods for dealing with subversive activities have been neither through legislation nor through the courts. The investigations conducted by the House Committee on Un-American Activities probing into the extent of Communist influence in major areas of American life, investigations into the loyalty of government employees required by Executive Order of President Truman, and designations of organizations as subversive by the Attorney General compose the elements of the non-legislative and non-judicial pattern.

The House Committee on Un-American Activities: — The laws authorizing the House Committee on Un-American Activities confine its investigations to propaganda that is "subversive," "un-American," and "attacks the principle of the form of government as guaranteed by our Constitution." In the ordinary peacetime construction of these terms, the Committee would be limited in its investigations to propaganda advocating the overthrow of the government of the United States. Actually, the Committe has never so limited itself, and Congress has never applied any limitations.

A CIVIL RIGHTS MAP OF AMERICA

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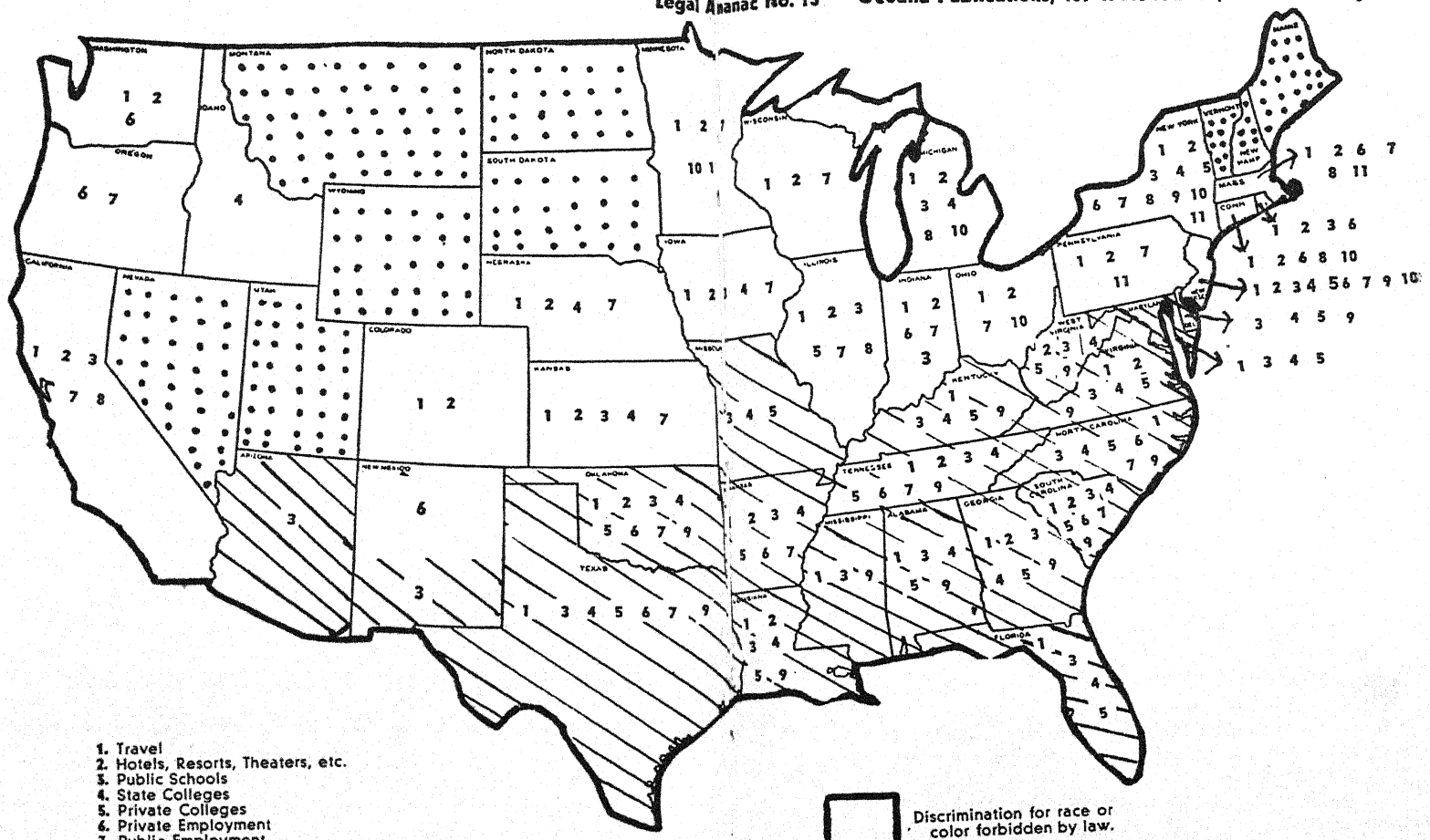

1. Travel
2. Hotels, Resorts, Theaters, etc.
3. Public Schools
4. State Colleges
5. Private Colleges
6. Private Employment
7. Public Employment
8. Civil Service
9. Health, Welfare Facilities
10. Insurance
11. Public or State Aided Housing

Discrimination for race or color forbidden by law.

Segregation of white and colored enforced by law.

No legislation

This has raised serious constitutional problems. The Supreme Court has held that there is a fundemental "right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of personal and private affairs." The Supreme Court has also held that investigations carried on by legislative committees must be related to some specific objective toward which the Congress has power to legislate. Since the First Amendment acts as a restraint on Congressional legislation in the area of freedom of expression, it follows that Congress cannot call for an unlimited inquisition into matters involving the exercise of freedom of expression.

Many of the witnesses summoned before the Committee have refused to answer questions as to their political affiliations and activities, arguing that the Committee is exceeding its constitutional powers in requiring the disclosures of personal and private affairs. When prosecuted for contempt, these witnesses have challenged the constitutionality of the Committee, on the grounds that it is conducting an unrestricted inquisition in an area that is beyond the power of Congressional legislation. Thus far, the courts have rejected these arguments, upholding the authority of the Committee and convicting recalcitrant witnesses for contempt. The Supreme Court has thus far not seen fit to review the convictions.

Another problem is raised by the fact that the Committee looks at its job as one of accomplishing by means of exposure and publicity what probably could not be done validly by legislation. Representative Martin Dies, at the time that he chaired the Committee, stated:

> "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession."

The practical effect of this conception of the Committee's operations is twofold: (1) to restrain the expression by many people of points of view in disagreement with accepted opinion; (2) to subject those who do express such opinions to serious repercussions ranging from hatred, ridicule and contempt of the public to loss of position and livelihood. The recent investigation

into Communist influences in Hollywood had this precise effect. The ten witnesses who refused to answer as to their membership in the Communist Party or the Screen Writers Guild (an alleged Front organization) were dismissed from their jobs, and the Motion Picture Association adopted a resolution barring the employment of persons of "subversive" or "un-American" character.

In 1948, climaxing ten years of investigation, the Committee introduced into Congress the Mundt-Nixon bill which would in effect have outlawed the Communist Party. The bill passed the House but was defeated in the Senate.

In the wake of bitter controversy over the merits and validity of the Un-American Activities Committee, one practical proposal has come forth—that the procedural safeguards basic to personal liberty (see Chapter II) be applied to Committee investigations. This would involve as a minimum the right of witnesses to counsel and the right to reply before the Committee to adverse comments made in connection with investigations.

State committees similar to the Un-American Activities Committee exist in California, Michigan and Washington.

The President's Loyalty Program:—The background of investigations into loyalty of government employees dates from 1939 when Congress passed the Hatch Act, among other things, making it unlawful for any government employee to have "membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." This was followed in 1941 by a Congressional appropriation to the FBI to inquire into subversive activities among government employees and by the attachment of riders to appropriations bills forbidding payment to persons who advocated or were members of organizations advocating the overthrow of the government of the United States. As applied to cut off the salaries of several federal employees during the war, these riders were declared unconstitutional as bills of attainder. A bill of attainder is one by which a legislature finds a person guilty of an offense and seeks to punish him for it without court trial.

During the war, a start toward a comprehensive loyalty check for executive employees was undertaken. This reached a climax in 1946 when President Truman promulgated his Loyalty Order requiring investigation of all employees in the executive branch and of all persons seeking employment.

The Order provides for each department to undertake a check of its employees. Appeals may be taken to a department head, and subsequently to the Loyalty Review Board which renders an advisory opinion. The Loyalty Review Board also functions as the coordinator of the entire Loyalty check mechanism, maintaining an index of all persons checked as well as an index of organizations designated subversive by the Attorney General. Investigations of organizations and individuals are conducted through the FBI.

The Order provides for dismissal of an employee where reasonable grounds exist for the belief that the person involved is disloyal." The standard is much broader than "advocating the overthrow of the government" and covers a wider variety of activities. The Order lists certain activities which may be considered in connection with the determination of loyalty. In addition to listing such criminal acts as sabotage, treason, sedition and advocating the overthrow of the government by force or violence, the Order lists

> "Membership in, affiiliating with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

This means that the determinations of the Attorney General as to whether an organization is subversive may also determine whether a federal employee who belongs to such an organization is disloyal. Actually, a person who may be completely passive in his membership or completely unwitting in his sympathy for an organization designated "subversive" may suddenly be confronted with the charge of disloyalty. In this connection, how-

ever, it must be pointed out that membership in an organization designated subversive is only evidence of disloyalty which a department board may consider along with all other factors in an employee's record; it is not in and of itself conclusive of disloyalty.

In terms of procedure, there is some greater measure of protection afforded the government employee under the loyalty program than is afforded a witness before the Un-American Activities Committee. It is required that notice of hearing be furnished the employee charged, that the nature of charges be stated in "sufficient detail" to enable the preparation of his defense, and that he be given the opportunity to confront the sources of evidence against him.

In some situations, security reasons prevent furnishing a completely detailed statement of charges and this has reduced the opportunities for adequate preparation of defense. In other situations, the right of the employee to confront the sources of the evidence against him has been limited where the board desires to protect a confidential informant and has information before it on which to evaluate the informant's report. On the question of counsel, the employee has the right to be accompanied by counsel, but it is not clear that this includes the right to complete representation by counsel.

Whatever criticisms have been directed against the loyalty program—and the program has been the subject of bitter controversy—there seems to be general agreement that the FBI has conducted its investigations in a careful and studied manner, with due regard for the rights of the persons involved. Their work proceeds with a minimum of publicity, and there is growing evidence that employees in many departments have been given the right to resign "without prejudice" rather than go through the hearings of charges.

The reports of the FBI as of June 30, 1948 show that of some two million employees investigated, only one-eighth of 1 per cent—a total of 2,632—were referred to loyalty boards. This figure does not include dismissals from the Army, Navy, State Department and Atomic Energy Commission which are not

covered by the Loyalty Order. These departments may summarily dismiss an employee without any filing of charges or hearing. At any rate, the evidence is clear that the overwhelming majority of federal employees are beyond question in their loyalty to this country.

The Attorney General's Subversive List:—The crux of the President's Loyalty Order is the power lodged in the Attorney General to prepare lists designating organizations as subversive. Since his findings are forwarded to the Loyalty Review Board and to department loyalty boards, the Attorney General becomes one of the most important factors in determining the loyalty of an individual government employee. In addition, the designation of an organization as subversive, with subsequent release of such information to the press, has serious effect on the status of the organization so designated—particularly in terms of membership and contributions.

There is no hearing afforded an organization before it is placed on the "subversive" list, and no opportunity is provided for review of the Attorney General's action. Several organizations designated as subversive have sought court injunctions to restrain the Attorney General from listing them. They have also asked the courts to decide that the exercise of this power by the Attorney General is unconstitutional. Thus far, the courts have rejected the petitions without opinion. The Attorney General's position is that his Department merely finds and releases the facts pursuant to the Order, and that an organization designated as subversive can show no injury resulting from any *regulation* and therefore has no cause of action.

The standard which the Attorney General uses in classifying organizations as subversive has been stated by J. Edgar Hoover, Director of the FBI, in his testimony before the Un-American Activities Committee. He has outlined the following tests of a "front" organization:

—— Does the group espouse the cause of Americanism or the cause of Soviet Russia?

—— Does the organization feature as speakers at its meetings known Communist sympathizers or fellow travelers?

—— Does the organization shift when the Party line shifts?

—— Does the organization sponsor causes, campaigns, literature, petitions or other activities sponsored by the Party or other front organizations?

—— Is the organization used as a sounding board or is it endorsed by Communist-controlled labor unions?

—— Does its literature follow the Communist line or is it printed by the Communist press?

—— Does the organization receive consistent favorable mention in Communist publications?

—— Does the organization present itself to be nonpartisan yet engage in political activities and consistently advocate causes favored by the Communists?

—— Does the organization denounce American and British foreign policy while always lauding Soviet policy?

—— Does the organization utilize Communist 'double talk' by referring to Soviet-dominated countries as democracies, complaining that the United States is imperialistic and constantly denouncing monopoly capital?

—— Have outstanding leaders in public life openly renounced affiliation with the organization?

—— Does the organization, if espousing liberal progressive causes, attract well-known, honest, patriotic liberals or does it denounce well-known liberals?

—— Does the organization have a consistent record of support of the American viewpoint over the years?

—— Does the organization consider matters not directly related to its avowed purposes and objectives?

While the major preoccupation of the Department of Justice since the end of the war has been with the activities of Communists, it should be made clear that both the Loyalty Order itself and the activities of the FBI have included investigations of Fascists as well. The "subversive" list contains a number of pro-Nazi and fascist organizations as well as communist and "front" organizations. During the war, the FBI did an incredibly thorough job in routing out fascists and foreign agents and in minimizing the possibilities of sabotage. Two Library of Congress documents, one on "Communism in Action" and the other on "Fascism in Action" were published and released through House action in 1947.

Free Speech and the Rights of Labor

Since the field of Labor Law is fully treated in Legal Almanac No. 7, we will here concern ourselves only with the rights of organized labor which involve freedom of expression. Specifically, these issues will be dealt with: (1) the right to peaceful picketing; (2) internal trade union democracy; (3) state restrictions on union activities; (4) the Taft-Hartley Labor-Management Relations Act; (5) the status of government employees.

The Norris-LaGuardia Anti-Injunction Act and the Wagner National Labor Relations Act were the Magna Carta of trade unionism in this country. The Anti-Injunction forbade the use of court injunction in a labor dispute. Under this Act, which applied to all disputes involving employees of persons engaged in interstate commerce, neither strikes nor picketing growing out of a labor dispute could be enjoined. The Wagner Act forbade employers in interstate commerce from discriminating in hiring, firing and upgrading of workers on the basis of union membership. It likewise required collective bargaining between an employer and the union chosen by the employees to bargain for them.

Following the lead of the federal government, many of the states passed Anti-Injunction acts and State Labor Relations acts, applicable to employer-employee relationships within their particular states. Anti-Injunction laws exist in 29 states—Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, Wisconsin and Wyoming. State Labor Relations laws exist in 10 states—Colorado, Connecticut, Delaware, Kansas, Massachusetts, Michigan, Minnesota, New York, Rhode Island and Wisconsin.

The Right to Peaceful Picketing:—

The Supreme Court has held that the picket line is labor's means of expressing its views to the community, and that the constitutional protection of freedom of speech and assembly

covers peaceful picketing for lawful objectives. Issues have arisen in the attempt to define "peaceful" and "lawful."

If there is any violence associated with the picketing, no matter how remote, the entire picket line can be enjoined. Blocking access to a "struck" plant has been held to be conduct requiring an injunction against picketing. If the picketing is "peaceful," but is aimed at securing "unlawful" objectives, it can be enjoined. Thus, even before the passage of the Taft-Hartley Law, in those states where the "closed shop" was already unlawful, a picket line aimed at securing a "closed shop" could be enjoined.

Prior to the passage of the Taft-Hartley Law, the Supreme Court extended the right to picket to include the boycott and the jurisdictional strike. The boycott is the picketing of non-union goods even though they are in the possession of a party who is not directly involved in a labor dispute. The jurisdictional strike is picketing by a competing union of an employer who has recognized as the bargaining agent the union designated by a majority of his employees. Under the Wagner and Norris-LaGuardia Acts, the Supreme Court has held both the boycott and the jurisdictional strike to be part of a "labor dispute" and therefore entitled to constitutional protection. Under the Taft-Hartley Law, both practices are made unlawful and therefore can be enjoined by the courts.

On the other side of the fence is the issue of freedom of expression for employers. The Supreme Court has held that so long as what an employer says does not imply coercion of his workers, he is free to speak his point of view. Where, however, the employer utters his remarks with a view to suggesting pressure to his employees, such remarks are a threat to the freedom of labor to organize and can be enjoined.

In some situations, the right to picket has been extended beyond "labor disputes." When a group of Negroes picketed a Washington, D. C. grocery, located in a Negro section of town and catering to Negro consumers, but refusing to hire Negroes, the Supreme Court held that a picket line to protest discrimination for reasons of race or color was as valid

as one protesting discrimination for reasons of union membership.

Within the last decade, picketing has become a standard device in political and ideological controversies. Here, however, the extent to which picketing is permitted is completely in the discretion of local authorities. In some communities, picketing, except in *bona fide* labor disputes, is totally forbidden and pickets may be criminally prosecuted for unlawful assembly or breach of the peace.

In other communities, picketing is permitted, but under strict police regulation. The police reserve the power to disband a picket line, to limit its members, to forbid or limit the carrying of placards and to take such action as may be deemed necessary by them to preserve the peace and prevent obstruction of traffic. In New York City, for example, picketing in public parks requires a permit. At times, police supervision leads to violence between pickets and police, often leading to the mass arrest and subsequent prosecution of the pickets. Except in labor disputes and as otherwise noted, the Supreme Court has maintained a "hands-off" attitude toward picketing, apparently leaving its regulation, as in the case of parades, to the local officials.

Internal Trade Union Democracy:—Under the Taft-Hartley Law, which outlaws the "closed shop," the union shop is legalized. This means that a worker need not be a union member when hired, but must join the union upon employment, provided a majority of the employees in each contracting unit desire it. Employers may retain workers unfairly denied admission to unions or expelled on any grounds save non-payment of dues.

The courts have held that a union designated as bargaining agent must represent all employees and cannot discriminate against Negroes in membership rights. Similarly, a union which excludes persons from membership because of race or color will not be certified as bargaining agent by the NLRB or by the State Labor Relations Boards. In 10 states, discrimination by labor unions for reasons of race, creed or

color is forbidden by law—Connecticut, Kansas, Massachusetts, Nebraska, New Jersey, New Mexico, New York, Oregon, Rhode Island and Washington. (For a discussion of discrimination in employment, see ahead page 95).

The courts have also held that criticism of union officials by union members cannot be a basis for dismissal from the union. Three anti-Communist members of the United Electrical Workers Union, expelled because of their activities against alleged Communist control, were ordered reinstated by the New York Supreme Court. In general, union members unfairly dismissed from their unions must seek their reinstatement initially through State Labor Relations Boards.

On the question of special assessments among union members, the courts have held that a member may properly be dismissed from the Union where he refuses to pay a special assessment levied for specifically Union purposes. The indications are, however, that refusal to pay a special assessment for political purposes cannot furnish basis for dismissal.

State Restrictions on Union Activities:—During the war, many of the states, in their efforts to cut down strikes and labor-management controversies, passed legislation calling for tight regulation of unions and union activity. Many of the regulations have since come to apply nationally through the Taft-Hartley Law.

The "closed shop" by which an employer may hire only a worker who is already a member of the Union, is outlawed in 14 states—Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Nebraska, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Virginia. The Taft-Hartley Law outlaws the "closed shop" for all unions under federal jurisdiction, i. e. engaged in interstate commerce.

Registration of union officials is required by law in 7 states—Florida, Georgia, Massachusetts, Michigan, North Dakota, Texas and Utah. The Florida and Texas laws, requiring registration as a prior condition to engage in union organization, have been held unconstitutional by the Supreme Court.

Financial statements must be filed by the unions in Minnesota, North Dakota and South Dakota. Books of account, open to inspection, must be kept by the unions in Florida and Texas. Annual reports of unions must be filed in Massachusetts, North Dakota, South Dakota and Texas.

Political contributions from union funds are prohibited in Massachusetts and Texas. Elections of union officials are regulated by statute in Minnesota, North Dakota and Oregon. A Texas provision regulating union elections was voided by the Texas Supreme Court,

The Taft-Hartley Labor-Management Relations Act:—The rights of labor, as set out in the Norris-LaGuardia and Wagner Acts, have been substantially curtailed by the Taft-Hartley Law which amends the prior acts. In brief, these are the provisions of the new law which involve freedom of expression.

—— The courts are given power to enjoin strikes "affecting national health and safety."

—— Restrictions are placed on union contributions or activities in in political campaigns. While the Supreme Court has not yet considered the validity of these restrictions, they have been held not to include reprint by union publication of a speech of one of its leaders supporting a particular political candidate or party.

—— Jurisdictional strikes and boycotts of non-union goods are banned.

—— Union rights under the Law can be withdrawn from any labor union whose officers are Communist Party members. The law requires that the officers of unions under federal jurisdiction file affidavits of non-Communist membership. The Supreme Court has upheld this provision as constitutional.

—— The "closed shop" is outlawed.

Government Employees:—In general, government employees do not enjoy the same rights as private citizens. The theory is that they accept the privilege of government service with the understanding that there will be some regulation of their personal freedom beyond that of the ordinary citizen.

Under the Taft-Hartley Law, while government employees may belong to unions, their participation in any strike is unlawful. An employee who strikes is subject to immediate

discharge and forfeiture of civil service status, and is ineligible to reemployment for a period of three years. Among the states, New York and Ohio prohibit all public employees from engaging in strikes. In New Jersey, strikes in public service industries are prohibited.

Under the Hatch Act, government employees may not take active part in political management or political campaigns. The Supreme Court has held that this does not restrict expression of opinion, but only political activity. Restriction against contributions of funds to political parties by government employees dates back to the last century. Under the provisions of the Loyalty Order, a government employee will be dismissed if investigation reveals reasonable doubt as to loyalty to this country.

CONCLUSION

The attempt in these pages has been to consider the statutory law and court decisions pertinent to the major issues involving freedom of expression—particularly, those issues which are in the news and on peoples' tongues today. These have included the problem of separation of church and state, specifically the issue of religion and the public schools; the conflict between religious conviction and the obligations of citizenship; the right of access to streets and public places to disseminate one's views; the issue of censorship of books, plays, motion pictures and other media of mass communication; the "clear and present danger" of subversive activities, and the means of dealing with them through sedition laws, "race hate" laws, deportation and denaturalization proceedings, loyalty investigations, and investigating committees; and the issue of the rights of labor against the background of securing labor-management relations.

In this analysis, perhaps the one outstanding fact has been the role of the United States Supreme Court in making a living tool of the First and Fourteenth Amendments to the Constitution.

CHAPTER TWO

PERSONAL LIBERTY

The essence of democracy is not only the right to freedom of expression, but also the knowledge that one's personal liberty cannot be disturbed except by "due process of law." Accordingly, the founding fathers wrote into the Articles of the Constitution and into the Bill of Rights a basic code of justice, protecting the individual against arbitrary action by government.

These guarantees of personal liberty include: (1) the privilege of the writ of habeas corpus (Article I, section 9); (2) protection against unreasonable searches and seizures (Fourth Amendement); (3) freedom from prosecution for serious crimes except by indictment or presentment by grand jury (Fifth Amendment); (4) the right to trial by jury in all criminal cases (Sixth Amendment); (5) the right to assistance of counsel (Sixth Amendment); (6) the right not to be a witness against onesself (Fifth Amendment); (7) the right to a fair trial consistent with due process of law (Fifth Amendment); (8) freedom from double jeopardy, i. e. no more than one criminal prosecution for the same offense (Sixth Amendment); (9) protection against excessive bail and fines and against cruel and unusual punishment (Eighth Amendment).

We have seen that the guarantees of the First Amendment, protecting freedom of expression against action by the federal government, apply equally and totally to the states by force of the Fourteenth Amendment. This is not true of the guarantees of personal liberty.

For example, the provisions of the Fifth Amendment requiring criminal prosecution to be instituted by indictment or

presentment by a grand jury is a constitutional requirement in federal courts only. A state prosecution instituted by information—where the District Attorney or the Attorney General, rather than a grand jury, makes the accusation—is valid. Likewise, many of the states dispense with jury trial in minor criminal cases, and the right to counsel in criminal cases is more extensive in federal courts than in state courts. Again, the protection against unreasonable searches and seizures, provided in the Fourth Amendment, operates differently under federal rules of evidence than under state procedures. The situation has been summarized by Justice Felix Frankfurter in a recent decision:

> "In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them."

It will be the purpose of this chapter to review the issues raised by the application of these guarantees to specific situations. At the outset, it should be observed that while the Supreme Court has the power to review a state criminal prosecution only if a constitutional issue is involved, it has complete power to review all criminal cases arising in federal courts.

HABEAS CORPUS—ARTICLE I. SECTION 9

"The Constitution of the United States originally contained no bill of rights. It did, however, protect civil liberty by a few scattered clauses. Five of these clauses listed things which the new federal government might not do. It could not, save in time of rebellion or acute public danger, suspend the writ of *habeas corpus,* the traditional safeguard against unjust imprisonment. It could pass no bill of attainder, a conviction and punishment for a crime by legislative act rather than by judicial process. It could pass no *ex post facto* law, that is, it could not, by passing a new law, make the position of persons accused of crime, less favorable than when the crime was committed. It could not deny to those who broke its laws a trial by jury. And finally, it could punish for treason only under carefully defined restrictions.

"Three other clauses protected civil liberty from state interference. No state might pass a bill of attainder; it could not pass an *ex*

post facto law; it could pass no law impairing the obligation of contracts. In addition, the states were directed to give to the citizens of each state the privileges and immunities of citizens in the several states. This was to prevent the citizen of a state from being treated like a foreigner when he went into other states." (from New Threats to American Freedoms," by Robert Cushman, Public Affairs Pamphlet No. 143).

Of all these guarantees of personal liberty that predated the Bill of Rights, the most important is the privilege of the writ of *habeas corpus* This is a writ by which a person who is being restrained of his liberty may secure a determination by a judge whether such restraint is proper. On hearing, the judge will generally limit himself to the question whether the detaining authority had jurisdiction. In a case arising during the Civil War, the Supreme Court held that a writ may be suspended only when martial law has been declared and the courts are actually closed. Mere existence of a state of war is insufficient to justify suspension of the writ.

Habeas corpus is not a substitute for an appeal, but is limited only to those situations in which the individual has no other means of judicial review. For example, an alien who is detained for deportation may sue out a writ of *habeas corpus* to have a judicial review of the legality of his detention. Similarly, an individual inducted into the Army may question the legality of his draft classification by suing out a writ of *habeas corpus.*

In recent years, the Supreme Court has broadened the scope of the writ. It is now considered an appropriate remedy where a conviction in a state court has been in disregard of the constitutional right of the accused, and where the writ is the only effective means of preserving all his rights. Wrongful failure to provide counsel to an accused in a criminal case is a sufficient basis to warrant review of conviction on *habeas corpus.* The reasoning behind this is that where constitutional rights are violated, a court loses jurisdiction in the course of a trial. On the other hand, the Supreme Court has also held that where an individual's rights can be completely protected through appeal, he cannot fail to appeal his conviction and

then subsequently bring *habeas corpus* to question the legality of his detention.

SEARCHES AND SEIZURES—THE FOURTH AMENDMENT

The people have the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Warrants shall issue only on probable cause and shall describe the place to be searched and the persons or things to be seized. So states the Fourth Amendment.

In general, an officer can make an arrest only with a warrant. If a crime is committed in his presence, however, an officer can make an arrest on the spot without a warrant. An officer may not, however, conduct a search without a warrant and then make an arrest on the basis of what he finds. Under these circumstances, the search, the seizure and the arrest are all unlawful.

Following a lawful arrest, the officer has the right to search the person of the prisoner and to seize those articles found on his person which are connected with the crime. The articles seized may be either the instruments of the crime, i. e. a gun in a robbery, or the spoils of the crime, i. e. stolen jewels. The officer may not seize papers which are evidence of the crime without a warrant.

In the absence of a warrant, the premises in which the prisoner is taken into custody may not be searched. However, visible articles which are the instruments of the crime may be seized, where there has not been sufficient time for the officer to secure a warrant. During Prohibition, for example, the police were privileged to seize bootlegged liquor in automobiles without a warrant, the courts taking into consideration the fact that a car could make a speedy getaway before a warrant could be secured. But the seizure of illegal distilling apparatus without a warrant, although incident to a lawful arrest, was held invalid, where there had been sufficient time to procure a warrant.

For a search warrant to be issued, there must be more than suspicion of crime. A warrant will issue only upon probable

cause. Moreover, it must describe specifically the premises to be searched. "Fishing expeditions" and general ransacking of a person's home are forbidden whether the officer acts under the authority of a warrant or without one.

On the other hand, the right of search and seizure with or without warrant is broadened where the articles seized are government property, such as gasoline ration coupons or draft cards. In a recent case, the Supreme Court affirmed the conviction of a person for illegal possession of draft cards which the arresting officer turned up after a five hour search of the defendant's home. The search warrant had specified only checks allegedly used by the defendant in a series of forgeries. In other words, the court affirmed conviction for a crime which had been uncovered only as a result of a search not specifically authorized by the search warrant. The Court appeared to be impressed by the fact that draft cards are government property.

In a subsequent case where government property was not involved, the Court retreated from this position, reversing the conviction of a woman who had been arrested without a warrant for conducting an opium den. The conviction was based on the opium which the officers discovered in her hotel room after a limited search. The Court held that there had been ample time for the officers to procure both a warrant for her arrest and a warrant to search her premises.

The Fourth Amendment does not protect the right of privacy generally. Thus, the interesting question frequently arises, "when is a search not a search?" If an officer uncovers evidence by eavesdropping, he is violating the right of privacy; but the courts have held that he is not violating the Fourth Amendment because he is not trespassing on the person, home, papers or effects of the individual involved. In short, he is not engaged in a "search" within the meaning of the Fourth Amendment. Whenever an officer uncovers crime through his senses, aided or unaided by mechanical gadgets—smell (bootlegged liquor, opium); hearing (eavesdropping, wiretapping, detectaphones); sight (peeping)—the Fourth Amend-

ment is not violated. It is only a trespass on the person or property or access to person or property by fraud or trick that is forbidden by the Fourth Amendment.

On the question of wiretapping, while the Supreme Court has held that the practice does not violate the Fourth Amendment, it has also held that the Federal Communications Act of 1934 forbids it. Most of the states also have laws which forbid wiretapping, but many of them exempt police officers. In New York, a police officer is permitted to tap wires only by warrant which issues where there are reasonable grounds to believe that evidence of crime may thus be obtained. The warrant must specify the means of communication to be tapped and must name the person or persons whose communications are to be intercepted and the purpose of the interception. Many experts of criminal and constitutional law have recommended the New York rule to the federal authorities.

Wiretapping brings into focus the difference between the federal government and the states on the question of the admissibility of evidence uncovered by unlawful searches and seizures. Under the Fifth Amendment, an individual has the right not to be a witness against himself. The federal courts have held that to permit evidence that is uncovered through unlawful searches and seizures or through other illegal methods to be introduced on trial would violate the privilege against self-incrimination. The federal rule, therefore, bars as evidence any matter that results from unlawful search or seizure. Since wiretapping is unlawful under the federal law, evidence secured by wiretapping is inadmissible in federal courts. Note, however, that evidence unlawfully secured by a state officer is admissible in federal court unless the state officer worked with federal officers or acted as their agent.

The state rules operate quite differently. In the first place, neither the Fourth Amendment nor the privilege against self-incrimination contained in the Fifth Amendment are binding on the states. Accordingly, most of the states follow the common law rule that an unlawful search or seizure furnishes only the basis of a civil or criminal action against the offend-

ing officer. They admit into evidence matter which has been secured by unlawful search or seizure. The theory behind this rule is that neither the guilty defendant nor the overzealous officer escapes punishment. The federal rule has been criticized on the grounds that it frequently permits a guilty defendant to go free and in no way punishes an offending officer.

Not every defendant who is convicted on evidence that has been obtained illegally can invoke the protection of the Fourth Amendment. If there is any suggestion of consent to search and seizure on the part of the defendant, he cannot subsequently challenge its legality even though it would have been unlawful had he not consented. Moreover, to invoke the Fourth Amendment, a defendant must be the direct and immediate victim of the unlawful search and seizure. Thus, if tapping the telephone conversations of A and B furnishes evidence of crime committed by C, C cannot secure a reversal of his conviction by resort to the Fourth Amendment.

PROSECUTION WITHOUT PERSECUTION—THE FIFTH AMENDMENT

Indictment by Grand Jury

The Fifth Amendment requires that prosecution for all "capital or infamous crimes" be instituted by indictment or presentment by a grand jury. The requirement has been held not to apply to the states, although most states have similar provisions in their state constitutions. In some states, like Louisiana and California, prosecution may be begun by information, i. e. the District Attorney or Attorney General, rather than the grand jury, makes a sworn accusation that the defendant has committed a crime. Michigan has a "one man" grand jury system under which a judge sitting as a grand jury may indict. The same judge who acts as a grand jury may not subsequently preside at the trial.

As to the specific crimes for which indictment is required, they are capital crimes—those which carry the death penalty as punishment—and infamous crimes—those which are punished either by imprisonment in a state penitentiary (as distinguished from a workhouse or county jail) or by sentence

to hard labor. Where neither a penitentiary term nor hard labor sentence is involved in the punishment, grand jury indictment is not required.

The Fifth Amendment lists certain exceptions to the requirement of indictment by a grand jury. Army or Navy personnel, accused of committing a capital or infamous crime, need not be indicted by a grand jury; likewise a member of the militia in time of war or public danger. During the Second World War, the Supreme Court decided that persons in the service of the enemy, although not expressly excepted by the languarge of the Fifth Amendment, need not be indicted by a grand jury but can be dealt with in accordance with military law by a military tribunal.

As to whether a person may waive the right to indictment or presentment by a grand jury, the courts have generally upheld the validity of state statutes authorizing waiver even where the state constitutions guarantee grand jury indictment. New York, however, has ruled that indictment is necessary to give a court jurisdiction to proceed and that a statute authorizing waiver of indictment is unconstitutional.

Double Jeopardy

The Fifth Amendment likewise prevents any person from being tried more than once for the same offense. This provision, like most of the guarantees of personal liberty, applies to the federal government only. However, except for Connecticut, Maryland, Massachusetts, North Carolina and Vermont, each of the state constitutions likewise incorporates this protection.

The major issue in securing this right is the definition of a "first jeopardy." For one thing, it is clear that this provision does not prevent a state from punishing a person for the very same conduct which is also a federal offense. During the Prohibition era, many persons were brought to book under both federal and state laws. Similarly, a criminal prosecution does not bar a civil action and vice-versa.

Where a verdict is reached:—As a general rule, it is not double jeopardy to prosecute twice for the same conduct, so

long as the crimes are different. Crimes are different unless the evidence required to sustain both is the same. Conviction or acquittal of a crime which includes lesser offenses will generally bar prosecution for the lesser offenses. Thus, if a man is prosecuted for rape, he cannot on acquittal be prosecuted for assault with intent to rape. Similarly, conviction or acquittal for a lesser offense bars prosecution for the greater offense which includes it. If a man is convicted of assult with intent to rape, he cannot then be prosecuted for rape. In like manner, prosecution for battery has been held to bar prosecution for attempted rape; prosecution for assault with intent to kill bars prosecution for mayhem; prosecution for petty larceny bars prosecution for robbery.

Where, however, after the first prosecution, a new circumstance, changing the criminal character of the defendant's conduct arises, the defendant may be prosecuted for the greater offense. Assume that a man is convicted of assault with intent to kill, and subsequently, his victim in fact dies, the death being traceable to the assault. The defendant may then be prosecuted for homicide. This is not double jeopardy since, on the first trial, the victim still being alive, the defendant could not have been prosecuted for homicide.

There is even the possibility of prosecution for homicide under these circumstances if the defendant is initially acquitted of assault with intent to kill. For in many states, i. e. Illinois, homicide other than murder in the first degree does not require intent to kill, and so a man might not be guilty of assault with intent to kill and still be guilty of homicide if his victim subsequently dies.

Where a lower court verdict is appealed, reversal of a defendant's conviction does not bar a new trial. However, when the prosecution appeals an acquittal, the majority of states will deny a new trial regardless of errors committed by the trial court.

Before verdict is reached:—In interpreting the double jeopardy provision, the courts have laid down the general rule that one is in jeopardy when put upon trial before a

court of competent jurisdiction, upon an indictment sufficient to sustain a conviction, and a jury has been impanelled and sworn to try him. Where a person is tried under an indictment so defective that conviction will have to be reversed for error, he may be indicted again. In like manner, a refusal of a grand jury to indict or the quashing of a proceeding prior to impaneling a jury will not bar subsequent indictment and prosecution.

But once the jury is impanelled, there being no defects in the indictment, the defendant is placed in "first jeopardy." Unless the defense subsequently requests a continuance (postponement) or some urgent necessity stops the trial prior to verdict of conviction or acquittal, any termination prior to verdict will be deemed a bar to a new trial. Urgent necessity sufficient to dispose of the claim of double jeopardy and permit a new trial has been found in the following situations: when the term of court ends before a decision is reached, when the jury is unable to agree within a reasonable time, when a biased judgment is feared, and when persons essential to the proper completion of the trial are excusably absent, i.e. a juror or the judge takes ill. The courts, however, have generally refused to find that absence of the prosecution's witnesses constitutes urgent necessity.

Sentence and Punishment:—Double jeopardy may arise in the sentencing of a defendant. Where a judge ordered payment of a fine, he was held barred from imposing a prison sentence after the fine had been tendered to the court. The statute in question gave the court the power to fine or to imprison but not both.

With reference to double jeopardy in punishment, perhaps the most spectacular case ever to arise involved the recent unsuccessful electrocution of a convicted Negro in Louisiana. The first electrocution having failed, the Supreme Court held that it was neither double jeopardy nor cruel and unusual punishment to attempt a second electrocution.

The Privilege against Self-Incrimination

"I refuse to answer on grounds that it may incriminate or

degrade me" is a response which is not available to witnesses with the regularity that one might suppose. As previously observed, the right not to be a witness against onesself, as laid down in the Fifth Amendment, does not bind the states, and insistence by a state court that a person give incriminating testimony will not be reviewed by the Supreme Court. Among the states, however, all constitutions except those of Iowa and New Jersey afford protection against self-incrimination. Nevertheless, despite protection both on the federal and state levels, a question put to a witness in federal court which may uncover evidence of state crime is not protected, nor is a question asked in a state court which may uncover violation of a federal law.

While the governing clause of the Fifth Amendment reads "no person shall be compelled in *any criminal case* to be a witness against himself," the courts have applied the privilege against self-incrimination to any proceeding where a witness may incriminate himself by answering a question or giving testimony. Thus, the privilege applies not only in criminal proceedings, but in grand jury investigations, bankruptcy proceedings, statutory proceedings for forfeiture of goods, and even in civil suits where an answer to a question might tend to establish the witness' criminal liability. Where the privilege operates, it is improper for a federal judge to comment on a refusal to testify, but it is not improper for a state judge to do so. In no case, however, may a judge charge that refusal to testify creates a presumption of guilt.

The privilege applies to both oral and written testimony. However, there are a number of situations where the privilege cannot be invoked. Corporations are not protected by the privilege, and the records of a corporation may not be withheld by its officers. Similarly, a public official cannot refuse to produce the public records in his custody.

A fundamental question that has been increasingly posed in recent years is whether the privilege protects private business records required to be kept by statute or administrative regulation. Although the Supreme Court has not yet directly

considered the problem, a majority of lower federal courts have held that such records are of a "quasi-public" nature, and therefore beyond the scope of the privilege against self-incrimination. Under these decisions, if a regulation is otherwise valid, it will not be unconstitutional for requiring records to be kept and subsequently produced, even though they may reveal evidence of crime.

Another problem that has become increasingly important in recent years is the operation of the privilege against self-incrimination at legislative investigations. There seems to be no doubt that the privilege applies. The issue is whether the privilege can be removed by the operation of an immunity statute, i.e. a statute which protects a witness from criminal prosecution on the basis of his testimony. The Supreme Court has held that an immunity statute merely providing protection against subsequent use of a witness' testimony as evidence in a criminal prosecution against him is insufficient to prevent the operation of the privilege against self-incrimination. Under such a statute, the testimony might furnish clues by which other evidence of crime could be uncovered, and the witness could then be prosecuted on the basis of such evidence. On the other hand, a statute which grants a witness total immunity from criminal prosecution as to any matter concerning which he testifies has been deemed sufficient to suspend the operation of the privilege against self-incrimination.

Under the present governing federal law, immunity is granted only to the extent that a witness' testimony cannot be used as evidence against him in a criminal prosecution. The immunity, then, is not absolute, and witnesses before a legislative investigating committee would apparently still have the right to refuse to give testimony, pleading the privilege against self-incrimination.

The privilege against self-incrimination may be waived, and this frequently becomes an important issue in court proceedings. A witness will be answering a series of questions and suddenly find himself confronted with the prospect of confessing to a crime if he answers the next question. The

courts have held that the privilege is waived where the witness, by answering some questions, leads himself to the point where the incriminating question is asked. He is expected to foresee the logical course of questioning, and to invoke his privilege early in the testimony.

Due Process

The reader will observe that most of the guarantees of personal liberty contained in the Bill of Rights are not carried over into the Fourteenth Amendment. The legal reasoning behind this has been the fact that both the Fifth and Fourteenth Amendments contain identically worded "due process" clauses, and that therefore due process under the Fourteenth Amendment can mean no more than it means under the Fifth Amendment. While in many ways the due process clause of the Fourteenth Amendment has grown to the stature of a second Bill of Rights, particularly in its protection of freedom of expression, in terms of personal liberty, it has come to mean only "fair trial," the same meaning which it has under the Fifth Amendment.

What are the elements of due process? In the first place, due process requires that a person receive notice of charge or claim against him and that, on demand, he be furnished with a bill of particulars specifying the exact nature of such charge or claim. Secondly, due process requires an atmosphere in which a fair hearing can be conducted. There is no "fair trial" where mob feeling is such that lynching is threatened if a prisoner is not convicted. There is no "fair trial" where the judge is prejudiced or where the jury is improperly chosen, i.e. Negroes have been deliberately excluded from jury service where a Negro is on trial. Thirdly, confessions extorted by third degree methods or by fraud and trickery are inconsistent with due process as is perjured testimony. The presence either of extorted confessions or of perjured testimony will require reversal of a conviction regardless of other evidence in the case.

Due process does not include the right to appeal, except that there must be a provision for judicial review where con-

stitutional issues are involved, i.e. by writ of *habeas corpus*. However, where a state has created an appeals machinery, to deprive a person of an appeal is a violation of due process as well as a denial of equal protection of the laws.

Of all the guarantees of personal liberty, due process is probably the most elastic, since it can be made to cover all situations in which minimum standards of fair hearing have not been maintained. Thus, while other guarantees of the Bill of Rights are not expressly binding on the states, if a state acts with wanton disregard of these guarantees, thereby prejudicing the defendant, the proceeding can be set aside as wanting in due process. This is particularly true where the right to trial by jury and to assistance of counsel under the Sixth Amendment is involved.

TRIAL AND DEFENSE — THE SIXTH AMENDMENT

Trial by Jury

The Sixth Amendment requires a speedy and public trial by an impartial jury in the district in which the crime has occurred. This requirement of jury trial applies to the federal government but is not binding on the states, and many of the states dispense with jury trial in prosecutions for minor crimes and misdemeanors. All of the states, however, have constitutional provisions requiring trial by jury for serious crimes.

As to whether trial by jury may be waived, the courts have gradually moved away from their former unyielding insistence on trial by jury where serious crimes are involved. With reference to the federal courts, the Supreme Court has held that partial waiver of jury, in the sense of agreement by defense and prosecution on less than twelve jurors sitting in a criminal case, is permissible. The language in this case has been used by state courts to validate statutes authorizing complete waiver of trial by jury notwithstanding the requirements of state constitutions. New York by constitutional amendment, authorizes the waiver of trial by jury in all cases where it is agreeable to defense and prosecution.

The more important issue in connection with trial by jury

is the requirement that the jury be impartial. For, while trial by jury, in and of itself, is not regarded as an essential element of due process, trial by an *impartial* jury is a different matter. A partisan or prejudiced jury, or one drawn from lists which exclude certain persons solely because of their race, class or sex, is a denial of due process and forbidden by the Fifth and Fourteenth Amendments to the Constitution.

The Supreme Court has indicated that it thinks that an impartial jury should be one chosen from a cross-section of the population. However, the Constitution does not secure to an accused person the right to have his race represented on the jury that indicts or tries him. It is only the deliberate exclusion from the jury lists of Negroes, laborers or women that is a violation of due process and a denial of equal protection of the laws. Accordingly, when the prosecution rejects all Negroes on the jury list, in the exercise of its privilege to reject up to twenty jurors without giving any reason, the courts have held that this is not a violation of due process.

This raises the problem of the legality of so-called "blue ribbon" juries, i.e. juries selected from lists composed of persons presumed to be more competent, more intelligent and less prejudiced than ordinary jurors. "Blue ribbon" juries are legal in eight states — Alabama, Michigan (Detroit only), New Jersey, New York (New York City only), Tennessee (civil cases only), Vermont, Virginia, West Virginia (civil cases only).

In most states where it is permitted, a "blue ribbon" jury may be granted on motion of either party where the court is convinced that the importance or intricacy of the case or the demands of efficient and impartial justice require it. In other words, the granting or denial of a "blue ribbon" jury is almost wholly discretionary with the trial court.

In New York, the "blue ribbon" jury is picked from the list of ordinary jurors by the county clerk. Each juror is personally interviewed and required to swear that he has no scruples against the death penalty, no such preformed opinion that he is unable to lay it aside, and no prejudice against

particular laws or defenses. In a recent case before the Supreme Court, two labor leaders charged with extortion challenged the validity of the New York "blue ribbon" jury system on the grounds that workers and women had been purposely excluded from the jury lists and that "blue ribbon" juries have a greater tendency to convict than do ordinary juries.

In a split decision, the Court upheld the "blue ribbon" jury, deciding that it is neither a violation of due process nor a denial of equal protection of the laws. The Court found no deliberate or systematic exclusion of workers, and found nothing wrong with the New York rule permitting women to claim exemption from both ordinary and "blue ribbon" juries.

Actually, the uniformly higher quality of ordinary juries is gradually outdating the "blue ribbon" jury. Pennsylvania abolished its "blue ribbon" jury system in 1937, and Massachusetts defeated a bill that would have authorized "blue ribbon" juries. New York, by a recent statutory amendment, set the same qualifications for ordinary jurors as for "blue ribbon" jurors.

Advice of Counsel

"Say nothing until you talk to me!" is the first advice of the criminal lawyer to his client who has just been booked on criminal charges. A person accused of crime, where he can afford counsel, will spare no expense to get the best lawyer in town. For, he recognizes that a good lawyer is his best protection. Yet, a great number of persons charged with crime, ranging all the way from minor offenses to first degree murder, are often too poor to engage the services of a lawyer and too ignorant to defend themselves properly. What protection does our system of justice offer these people?

"In all criminal prosecutions, the accuser shall enjoy the right . . . to have the assistance of counsel for his defense." So reads the Sixth Amendment to the Constitution which, like the other guarantees of personal liberty, applies only to the federal government. This means that any person charged with the commission of a crime under federal laws is entitled to a lawyer. No distinction is made between capital crimes —

those for which the death sentence is the penalty — and noncapital crimes. In fact, even minor offenses under federal laws have been held to require the appointment of counsel for a defendant who is unable to pay for legal services.

The right to counsel in state courts is not as extensive as in federal courts. In all capital cases, the rule is the same. Whether there is a state statute or no, the court must appoint counsel to represent a defendant where the penalty on conviction will be death and the defendant is unable to supply counsel of his own. In noncapital cases, however, the federal rule is not applicable to the states.

Where there is a state statute, the state court is required to follow it. Statutes requiring that indigent defendants in noncapital as well as capital criminal cases be provided with counsel on request exist in 25 states — Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington and Wyoming. Georgia and Kentucky require appointment of counsel in all criminal cases by constitutional amendment. In Connecticut, Florida, Indiana, Michigan, Pennsylvania, Virginia, West Virginia and Wisconsin, court decisions have established the requirement that in all felonies or criminal cases punishable by imprisonment in a penitentiary or by imprisonment for several years, indigent defendants must be provided with counsel on request.

In Alabama, Mississippi, Maryland and Texas, the right to counsel in noncapital cases has been totaly rejected. In Colorado, Delaware, Maine, Massachusetts, New Mexico, North Carolina, Rhode Island, South Carolina and Vermont, there are no set rules. In these states, the right to counsel will depend on whether the absence of counsel will so prejudice the conduct of defendant's trial that it cannot be said to be a "fair trial," and therefore violates due process.

Thus, in noncapital cases, a defendant seeking to establish the unconstitutionality of his conviction on the grounds that

defense counsel was not appointed, must show that either in view of the seriousness of the charge against him or the complicated legal issues involved, or his youth and ignorance, or the bias or error of the trial judge, the absence of counsel so prejudiced him that the trial did not square with "common and fundamental ideas of fairness." In the absence of these prejudicial factors, it has been held that a state court need not ask the accused whether he desires counsel, nor whether he can procure counsel, nor need the court assign counsel if the accused is unrepresented.

But even where the right to counsel is established, there are still questions as to the extent of the protection afforded. The following general conclusions may be stated: (1) Even if the accused desires to plead guilty at arraignment, he must be advised of his right to counsel both in the federal courts and in those states which require the appointment of counsel. Moreover, a plea of guilty is not in itself a waiver of the right to counsel but may be introduced as evidence of waiver. Thus, a defendant who has pleaded guilty and has not had the benefit of counsel at any stage of the proceeding may attack his conviction on the grounds that he was not represented by counsel, so long as he can prove that he did not waive his right. If he can prove that at the time he pleaded guilty, he was insane, under the influence of drugs, deaf, ignorant of his rights or influenced by coercion or false promise, it will not be said that he waived his right to counsel.

(2) The right to counsel means effective assistance of counsel and requires that counsel be competent, that there be opportunity to confer privately with and receive the advice of one's counsel, that there be opportunity for counsel adequately to prepare the defense, and that there be opportunity for counsel to present the case without interference or prejudice.

(3) As to whether counsel is required to be present at all stages of a proceeding, in capital cases, the courts have leaned to the rule that regardless of whether or not the accused has been prejudiced by the absence of counsel either at arrraign-

ment, trial or sentence, absence at any one stage is a deprivation of the right to counsel. In noncapital cases, however, the courts have looked to the issue of whether or not the accused was actually prejudiced by the absence of counsel. In New York, for example, the absence of counsel at arraignment has been held to be cured by counsel's subsequent presence at the trial or on the day of sentence. Likewise, where counsel's withdrawal before verdict was found to cause no prejudice to the accused, absence of counsel did not void the proceeding. In general, it is most important for counsel to be present at sentence, in order to take advantage either of a motion for a new trial, an appeal or a request for leniency in sentence.

Other Rights of the Defense

Under the Sixth Amendment, a defendant has the right to be confronted with the witnesses against him and to have compulsory process (subpoena) to bring forth the witnesses in his favor. On trial, both the prosecution and the defense have the right to cross-examine each other's witnesses.

The Eighth Amendment protects a person charged with crime from excessive bail and fine and from cruel and unusual punishment. While, in general, the courts will not review the figure at which bail is set, discrimination by federal officers in the setting of bail or fine is forbidden.

CONCLUSION

In making a reality of the guarantees of personal liberty contained in the Bill of Rights and of the due process clause of the Fourteenth Amendment, the state courts and the United States Supreme Court have had the problem of pointing a path to freedom for those who are the victims of ignorance and injustice while, at the same time, not opening the gates of our jails for hardened criminals. The growing tendency is to view each case on its particular facts, to ascertain whether fundemental concepts of justice and fairness have governed. While this approach makes for some uncertainty in the administration of law, it is perhaps the surest way to protect both the rights of the accused and the rights of the community.

CIVIL RIGHTS

We earlier defined civil liberties as those rights derived from the Constitution which can be asserted by the people against both the state and federal governments. In the previous pages, we have examined how these liberties have been defined and what limits have been set upon them by the courts and the legislatures.

It is one thing, however, to protect the people against the government; it is quite another to protect them against themselves. While the founding fathers dealt wisely with the possibility of tyranny by government, it was only through trial and error experience that we came gradually to deal with the problem of the tyranny of the majority.

Under the Constitution, the government could not act to quiet an unpopular viewpoint; but there was little to stand in the way of a mob riding a man out of town because he spoke his mind. Under the Constitution, the government could not act to establish any one religion; yet, there are pages of our history which tell of unpunished burnings of churches, libels and slanders against members of minority religious groups and incitement to violence against them. Under the Constitution, the government could not reduce any American to second class citizenship because of the color of his skin or his racial origin; intolerance, however, created discrimination against colored persons, and in some instances, the outright threat to their lives, liberty and property.

Over the past eighty years, this problem of the protection of the people from one another has come to be dealt with in an increasingly effective and successful way—through a combination of amendments to the federal Constitution and through state and federal legislation. The rights thus created, designed primarily to protect the freedom of the individual against attacks by other persons, are known as our "civil rights."

CHAPTER THREE

FEDERAL PROTECTION FOR CIVIL RIGHTS

The major responsibility for the protection of civil rights has fallen to the states, largely because the power of the federal government is very strictly defined in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, known as the "civil rights" Amendments. The Thirteenth Amendment abolishes slavery. The Fourteenth Amendment contains three specific prohibitions: (1) no state shall abridge the privileges and immunities of citizens of the United States; (2) no state shall deprive any person of life, liberty or property without due process of law; (3) no state shall deny to any person the equal protection of the laws. The Fifteenth Amendment assures that the right to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude. Each Amendment empowers Congress to enact enforcing legislation.

These Amendments, while protecting civil rights, also limit the power of the federal government to act. While the Anti-Slavery Amendment (XIII) applies to the federal government, the states and private individuals alike, the Due Process Amendment (XIV) prohibits only state action, and the Vote Amendment (XV) prohibits only federal and state action. Thus, violations of civil rights by state or federal officers may always be dealt with by federal action, *but there are relatively few violations of civil rights by private individuals with which the federal government has power to deal.*

These limitations become clearer upon examination of the two federal civil rights sections which are currently of major importance:

Section 241 (formerly section 51) of Title 18 of the United States Code is directed against any two or more persons who conspire to interfere with a citizen in the exercise of rights or privileges guaranteed by the Constitution or laws of the United States. The penalty for violation is a fine of not more than $5,000 or imprisonment for not more than ten years or both.

This section protects a citizen (not merely a resident) against a conspiracy of individuals (they may be either private individuals or public officers) to deprive him of his constitutional rights and privileges.

Section 242 (formerly section 52) of Title 18 of the United States Code is directed against any person who, under color of law, commits either of two offenses: (a) willfully denies to any inhabitant the rights and privileges guaranteed by the Constitution and federal laws; (b) willfully subjects any inhabitant, on account of his alienage, color or race to different punishments than are prescribed for the punishment of citizens. The section provides a fine of not more than $1000 or imprisonment for not more than one year or both.

Unlike section 241, section 242 protects aliens as well as citizens, and can be violated by a single person acting alone, so long as he acts under color of law. The section cannot be used against private individuals, whether acting singly or together.

Conspiracy to Violate the Rights of Citizens

Section 241, the Conspiracy section, protects the constitutional rights and privileges of citizens against interference by a conspiracy of private individuals. Actually, the rights and privileges of citizens that are guaranteed by the Constitution against interference by private individuals are few in number.

They do *not* include: (a) rights stated in the Bill of Rights and incorporated into the Fourteenth Amendment; (b) privileges and immunities of the citizens of the states (the vast majority of civil rights); (c) the right to equal benefit and protection of the laws. Section 241, therefore, does *not* protect the citizen against conspiracy of private individuals to deprive him of (a) the right to freedom of speech, press, assembly and religious worship; (b) life, liberty or property

without due process of law; (c) equal protection of the laws; (d) the right to come and go from state to state.

They do include: (a) federal rights and privileges implied in the Constitution from the relationship of the citizen to the federal government; (b) rights secured under the Anti-Slavery Amendment which is specifically applicable to private individuals. Section 241 does protect, therefore, the following rights against interference by private individuals:

—— the right to be free from slavery and involuntary servitude;

—— the right of a qualified voter to participate in a *federal* primary or *federal* election and have his ballot fairly counted;

—— the right to accept a *federal* office, and to perform the duties thereof;

—— the right to assemble and petition for redress of grievances concerning problems relating to the *federal* government;

—— the right to inform a *federal* officer of facts relating to the commission of an offense against the laws of the United States;

—— the right to be free from mob violence (lynching) while in the custody of a *federal* officer;

—— the right of a witness to be protected in giving testimony before a *federal* tribunal;

—— the right to enjoy the execution of a *federal* court order in one's favor.

—— the privilege of the writ of habeas corpus;

—— the right of a citizen of the United States to become a citizen of any state by legal residence therein (but not the right of coming and going from one state to another).

Section 241 protects, in addition to rights guaranteed by the Constitution, rights created by the laws of the United States. Thus far, the only such right clearly protected by section 241 has been the right under the Homestead laws to make a homestead entry and hold the land. However, it is

probable that section 241 protects all rights created by federal laws which themselves carry no criminal penalties or inadequate ones.

The Civil Rights Section of the Department of Justice has called attention to the possible use of section 241 to protect rights and benefiits stemming from the Social Security Act, the Fair Labor Standards Act, the National Labor Relations Act, acts conferring rights and benefits on the G. I. and the veteran, housing acts and agricultural acts.

Denial of Rights Under Color of Law

Section 242 protects, in addition to the rights secured by section 241, the following rights of *all persons* against interference by any person acting under color of law:

—— those rights stated in the Bill of Rights, i.e. the right to a fair trial, the right to be free from arrest and detention by methods forbidden by the Constitution, the right to be free from extortion of property by such methods, the right to be free from extortion of confessions, the right to be free from interference with the free exercise of speech, press, assembly and religion, and the right to be free from mob action (lynching) incited by or involving public officers of the state;

—— the right to come and go from one state to another;

—— probably, the right to equal protection of the laws.

Based on the operation of these laws, here is the picture of federal protection for civil rights in the major areas.

The Right to Safety and Security of the Person

.....against Police Brutality and Lynching: Section 242 is today the major source of federal power in prosecuting law enforcement officers guilty of police brutality or involved in lynching. The existence of federal power has become important in view of the reluctance of many of the southern states to prosecute lynchers under state law.

Where a law enforcement officer uses only enough force

to take a prisoner into custody, he is not guilty of violating section 242 (nor, for that matter, of violating any state law) even though the force used causes death or permanent injury to the victim. Moreover, even if more force than is justified is used by an officer (force sufficient to warrant prosecution under state law), unless it can be proved that he acted *willfully* to deny a constitutional right of his victim, he cannot be prosecuted under section 242.

Thus, even if an officer willfully causes death, under circumstances which do not justify killing, unless the killing was done to deprive the victim of a constitutional right—such as his right to a fair trial—section 242 does not apply. If, however, a constitutional right has in fact been denied, the amount of force used will help decide the question of willfulness. A prolonged assault, for instance, has been held to show willfulness; dealing one or two blows is insufficient proof of willfulness.

The following types of conduct, amounting to police brutality, have been prosecuted under section 242:

—— A law enforcement officer, uses third degree treatment on an arrested suspect in order to extort a confession.

—— A law enforcement officer, operating a racket, causes the arrest and imprisonment of innocent people for purposes of extorting money from them.

—— A law enforcement officer, seeking to prevent a person from expressing his point of view, forces a large dose of castor oil down him, and then runs him out of town.

—— A law enforcement officer arrests a person, and then, without trial, requires his prisoner to do forced labor on the officer's property.

—— A law enforcement officer uses his authority to make an arrest, and then kills his prisoner as part of a willful attempt to deprive him of a fair trial.

Where a lynching has occured, the chances of federal prosecution of the lynchers will depend on the circumstances.

A mob vested with no authority tracks down a victim and kills him. No prosecution is possible under either section 241 or 242.

A deputized posse, or one led by a public officer, takes a victim into custody and kills him. Prosecution of all members of the posse is possible under section 242.

A mob takes a victim from federal custody and kills him. Prosecution of all members is possible under section 241.

A mob takes a victim from the custody of a state officer and kills him, the officer not being involved. There is only a doubtful possibility of prosecuting the members of the mob under section 241.

A mob takes a victim from the custody of a state officer and kills him, with the cooperation of the officer. Prosecution of the officer is possible under section 242. There is, however, only a doubtfful possibility of prosecution of the private individuals of the mob under section 241. Where the mob induces the officer to yield the victim, there is the possibility of prosecuting the members of the mob for conspiring to bring about interference with a constitutional right by a public officer.

A mob takes a victim from the custody of a state officer and kills him, the officer doing nothing to resist the will of the mob, but not cooperating actively. Prosecution of the officer for his inaction is possible under section 242. While there is only a doubtful possibility of prosecution of the private individuals of the mob under section 241, as in the preceding illustration, where the mob has induced the officer to yield the victim, there is the possibility of prosecution of the members of the mob for conspiring to bring about interference with a constitutional right by a public officer.

. . . *against Unequal Justice*: On the grounds that all people must stand equal before the law, the Supreme Court has set aside convictions where (1) evidence accepted against the accused has been extorted by third degree methods; (2) an accused person has not been provided with adequate legal counsel, nor adequately informed of his rights; (3) the com-

position of the jury has been deliberately discriminatory in its exclusion of members of particular groups, e.g. Negroes, union members, women, etc.; (4) the fine or punishment imposed has been excessive as against that imposed on "white citizens" for similar offenses.

In each of the foregoing instances, there has been a denial of the equal protection of the laws. While there has been no Supreme Court decision as yet on the question, section 242 clearly permits the prosecution of state offifficers who willfully persist in pursuing practices declared to be illegal by the courts.

. . . *against Involuntary Servitude*: Where a person is forced into slavery or bondage by another, sections 241 and 242 are only partially effective to deal with the situation. Unless there is a conspiracy, section 241 will not apply. Unless a public officer is involved, section 242 will not apply.

Where the victim has been enslaved because he owes money or is otherwise indebted to the "master," section 1581, called the Anti-Peonage Act, will apply. Under the Anti-Peonage Act, not only have persons been convicted for seeking to make a slave of a man in order to collect a debt, but "forced labor" laws have been declared illegal

One such law provided that a person imprisoned for inability to pay a fine could be released into the custody of one willing to pay the fine for him. The rub was that the released person was then required to work off the debt to the fine-payer.

Another such law made it a crime to obtain an advance payment from an employer by signing a written contract to perform labor with no intention of carrying through the contract. This law was voided by reason of an additional clause providing that failure to perform the agreed services would be regarded as basic evidence of an attempt to defraud the employer at the time that the contract was made.

The Anti-Peonage Act will apply in all situations where debt is the basis of bondage, irrespective of whether there is

a conspiracy and irrespective of whether the "master" is a private person or a public officer. Where, however, the element of working off a debt is absent, and the situation is not covered by either section 241 or 242, the Slave Kidnaping Law (section 1583), an ancient carry-over from the last century, has some use.

Where an individual private person forces another into slavery, in the absence of a debt, according to the Civil Rights Section of the Department of Justice, he can be prosecuted under the Slave Kidnaping Law. Up to the present time, this law has been used only once—to prosecute a man and his daughter who had held a Negro as their "slave" for a period of five years.

The Right of Citizenship and Its Privileges

The Right to Vote: All citizens of the United States who are otherwise qualified by law to vote at any election, are entitled to vote at all elections, without distinction of race, color or previous condition of servitude. This section, 31 of Title 8 of the United States Code, was passed in 1870 pursuant to the Fifteenth Amendment. While no penalties are provided, the section has been used as the basis of civil proceedings designed to secure the right of the Negro at the polls in southern states.

For example, the "grandfather clause," contained in the statutes of some southern states, and aimed at Negro suffrage, is a violation of this section. The "grandfather clause," in regulating qualifications for voters, fixes standards of literacy and exempts from meeting those standards persons who have served in the Army or Navy of the United States or in the Confederate States in time of war, as well as their lawful descendants. This regulation was held to constitute unfair discrimination because it automatically granted voting privileges for life to white citizens, while subjecting Negroes to additional burdens. As a result of the operation of this clause, in 1902, 90% of the Negroes in Alabama were disqualified from voting. The clause was declared illegal in 1915.

More recently, the "White Primaries," those from which

Negroes or other persons are excluded because of race or color were declared to be a violation of section 31. "White Primaries" are now illegal, whether they are run by the state at state expense, or by a political party at party expense or even where the state has severed all connection with the primary system. Party workers who deny to Negroes the right to vote in federal primaries are now liable to prosecution under section 242, and they cannot escape liability by pleading that they are private individuals, and therefore beyond the reach of the arm of the federal government.

In the wake of Supreme Court decisions outlawing the "White Primary," South Carolina and Mississippi have sought to impose "party loyalty" tests on Negroes. By requiring the Negro voter to subscribe to a code that is the very opposite of what is in his own self-interest, the Democratic Party in these states has sought to bar Negroes from registering on the grounds that they refuse to abide by the party platform. The Supreme Court has held this device to be a flagrant violation of freedom of expression, and has declared it illegal.

Numerous other devices, however, continue to prevent the maximum participation of Negro citizens at the polls of the southern states. The poll tax, for instance, has been held by the Supreme Court to be a lawful exercise of the state's taxing power, and therefore it continues to be legal for a state to bar from voting a person who has not paid the requisite levy. Alabama, Arkansas, Mississippi, South Carolina, Texas and Virginia require the payment of a poll tax as a condition of voting.

More rigorous than the poll tax requirement are the literacy and character tests of many of the southern states, administered, almost without check, by local registration officers. The phrasing of these tests is typified by the requirement of North Carolina that "every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language." The most demanding test is contained in the "Boswell Amendment" to the Ala-

bama constitution, providing, in addition to the above requirement, that "no persons shall be entitled to register as electors except those who are of good character and who understand the duties and obligations of good citizenship under a republican form of government." Despite the arbitrary use of literacy, character and property ownership tests by officials to exclude Negro voters, the tests, in and of themselves, have been held to be legal.

The foregoing situations have dealt with the extent of federal protection, chiefly through the Supreme Court, of the Negro's right to vote. The following are the ways in which the federal government seeks to secure honest elections.

—— In a federal election, intimidation, threat or coercion of a voter can be prosecuted (1) under section 241, where there is a conspiracy of private persons or public officers or both; (2) under section 242, where a public officer is involved; (3) under the Hatch Act (section 594 of Title 18 of the United States Code) in any situation. The Hatch Act also provides for prosecution of those who interfere with the right to vote by promising federal employment or benefit or threatening loss of employment, benefits or relief.

—— In a federal election, fraudulent counting of votes or stuffing the ballot box can be prosecuted (1) under section 241, where there is a conspiracy of private persons or public officers or both; (2) under section 242, where a public officer is involved.

—— In a federal primary, fraudulent counting of votes or stuffing the ballot box can be prosecuted (1) under section 242, where a public officer is involved; (2) under section 241, where there is a conspiracy of public officers; (3) doubtfully, under section 241 where there is a conspiracy of private persons.

—— In a purely state election, where there is interference with the right of the voter because of race or color, or where fraudulent conduct interferes with the right to vote for reasons of race or color, a public officer

can be prosecuted under section 242. Private persons, however, who interfere with the right to vote in a state election cannot be prosecuted under section 241.

The Right to Come and Go: The right to come and go from one state to another is protected against interference by state officers by the Fourteenth Amendment. A state officer who willfully interferes with the freedom of movement from state to state of an American citizen may be prosecuted under section 242. Where, however, private persons conspire to interfere with the freedom of movement of an American citizen, it is not yet clear that they can be prosecuted under section 241, although their conduct may violate another federal law such as the "White Slave" Act.

The Right to Bear Arms: The right of the people to keep and bear arms is protected by the Second Amendment to the Constitution. The chief problem has been military service for Negroes.

Since 1940, no Negro, because of race, may be excluded from enlistment in the Army for service with colored military units now organized or to be organized (Section 621a of Title 10 of the United States Code). At the present time, all Armed Services are open to persons of all races and colors, but except in rare instances during the Second World War, segregation of whites and Negroes in both the Services and the National Guard has been scrupulously practiced. A recent order of Secretary of Defense Johnson calls for an end to segregation in the Armed Services.

The Right to Freedom of Expression

Speech, Press, Assembly and Religion: Where a public officer by threat, force, intimidation or coercion willfully denies to any person freedom of speech, press, assembly or religion, he can be prosecuted under section 242. Where, however, a group of private persons conspire to deprive another of his right to freedom of expression, they can be prosecuted under section 241 only if there has been interference with the right of expression on a federal matter, i. e. any matter that

is within the range of federal regulation or activity. Interference by private persons with freedom of expression on local issues, however, has been held, up to the present, to be beyond federal protection.

Rights Under Federal Laws

Where threat, force, intimidation or coercion is used to deprive persons of their rights and privileges under federal laws, there is a probability that prosecution will lie under section 241 where private persons have conspired to interfere with federal rights, and under section 242, where interference has been by public officers. During recent years, sections 241 and 242 have served as the basis for prosecutions of both private persons and public officers guilty of interference with the rights of labor, particularly those guaranteed by the National Labor Relations Act and the Fair Labor Standards Act.

The Right to Equality of Opportunity

If a state were to deny to any of its residents, because of race or color, the right to find a job, or adequate housing, or the right to go to theatres, beaches or hotels, such action would violate the equal protection of the laws clause of the Fourteenth Amendment and would be illegal. Thus a licensing ordinance of one west coast city was held invalid when it was found to discriminate against Chinese in their right to own and operate laundries. Likewise, a municipal ordinance of a southern city, seeking to restrict its Negro residents to particular areas of the town, was declared void. More recently, the Supreme Court declared the restrictive covenant unenforcible. The restrictive covenant is a device by which the owners or lessors of real estate are prevented by written agreement from selling or leasing to members of named races, colors or religions. The courts of this country, both state and federal, no longer have the power to enforce such restrictions.

Where, however, a state provides for separate but equal facilities for Negroes and whites or for Indians and whites, such action is legal. Provision for separate schools, separate hospitals, separate travel accommodations, separate sections

in theatres, etc.—in other words, completely segregated facilities—is not a denial of constitutional rights. In fact, compulsory or permitted segregation in one field or another is law in some eighteen states. (See ahead page 93). It is interesting to observe, however, that both the state legislatures and the courts have rejected the doctrine of "separate but equal facilities" for Mexican-Americans.

The role of the federal government in protecting the right to equality of opportunity is almost exclusively limited to situations in which the states and their officers discriminate against their residents for reasons of race, color or creed. Where such discrimination is willful, there is the possibility of criminal prosecution under section 242. Where, however, the right to equality of opportunity is denied by private persons—as where an employer will refuse to hire a Negro; or where a hotel will refuse to cater to Mexicans, Negroes or Orientals; or where a college will maintain quotas against Jews and Italians—the federal government, at the present time, is virtually powerless to intervene.

In 1875, the Congress passed "An Act to Protect All Citizens in Their Civil and Legal Rights." Under this Act, all persons were held entitled to the full and equal enjoyment of inns, public conveyances, theatres and other places of public amusement. Violation of the Act was a misdemeanor and provision was included for $500 civil damages to be paid by the offender to the person aggrieved.

About eight years after the adoption of this Civil Rights Act, the Supreme Court held it unconstitutional. The Court decided that the Fourteenth Amendment, under which the law had been passed, prohibited only invasions by the *states* of the rights of individuals, but not the invasion of those rights by other *individuals*. The Court declared that the regulation of the conduct of individuals toward one another on matters of civil rights was exclusively the job of the states and not the federal government.

As a result of this decision, the power of the federal government to protect civil rights against the attack of private

persons became limited to (1) those situations, involving interference by private persons with constitutional rights, within the scope of section 241, and (2) those situations in which the federal government has power to legislate apart from the Civil Rights Amendments (XIII, XIV, XV) to the Constitution. Since the right to equality of opportunity is not specifically guaranteed by the Constitution against interference by private individuals, there are no situations involving discrimination by private persons in employment, education, housing, welfare or public accommodations that are covered by section 241.

What power exists in the federal government to protect equality of opportunity, therefore, exists only by reason of other constitutionally delegated powers.

The War Power: Under the Constitution, Congress has extensive power to regulate the armed forces and to legislate concerning national defense and security. Congress may thus legislate with respect to (1) treatment of minority groups in the Armed Services, (2) interference with members of the Armed Services in the exercise of their rights, (3) employment policies of companies and unions engaged in the construction or operation of military and naval installations or the production of war defense materials. Related is the congressional power to assure distribution of veterans' benefits on an equal and non-discriminatory basis, e. g. the exclusion of schools which discriminate in admission of students from benefits under the G. I. Bill of Rights.

Power to Regulate Interstate Commerce: Under the Constitution, Congress has the power to regulate interstate commerce. This clause affords the federal government power to enact laws prohibiting discrimination in employment by those engaged in interstate commerce or those engaged in businesses or trade affecting interstate commerce. It likewise affords power to forbid discrimination by trains, buses, planes and other public conveyances operating between states.

The Taxing and Spending Powers: Likewise derived from the Constitution are the taxing and spending powers of Con-

gress, under which Congress has power to condition grants-in-aid, the award of government contracts and tax exemption. Through the exercise of these powers, the federal government can deal with discriminatory practices by health, welfare and educational institutions, discriminatory policies of companies and unions holding or seeking government contracts, and the discriminatory policies of real estate and public housing interests.

The federal government has exercised the foregoing powers to protect equality of opportunity as follows:

—— In appointments, promotions, exemption and compensation under classified civil service, there shall be no discrimination against any person on account of race, creed or color (Section 681, Title 5, U. S. Code). The policy of non-discrimination in civil service was given further impetus in 1948 by an Executive Order of President Truman to Department heads, requiring affirmative action within the federal service to prevent discrimination. Defense Secretary Johnson's order, abolishing segregation in the Armed Services, was issued pursuant to this Executive Order.

—— During the Second World War, the Temporary Federal Fair Employment Practices Commission, created by Executive Order of President Roosevelt, sought to eliminate discriminatory employment practices in war industries and in firms engaged in work on government contracts.

—— No theatre or other public place of entertainment or amusement in Washington, D. C. or in the Territories may discriminate against a person wearing the uniform of the armed forces for reason of race, color or creed (Section 244, Title 18, U. S. Code).

Apart from these isolated instances, what protection there has been for equality of opportunity against the discriminatory practices of private persons, has been the result of state legislation and enforcement.

CHAPTER FOUR

STATE PROTECTION FOR CIVIL RIGHTS

The states vary among themselves in the ways in which and the extent to which they protect civil rights. This is pointed up visually in the "Civil Rights Map of America" which has been specially prepared for this volume. The major fields in which the states have acted include the outlawing of discrimination in travel, public accommodations and places of amusement, public schools, private and state colleges, civil service, public works employment, employment in war industries, private employment, public housing, veterans housing, hospitals, health and welfare institutions and insurance.

New York State, with perhaps the most extensive civil rights code of any state in the country, has legislated in each of these areas. New Jersey and Massachusetts have enacted laws in the majority of these areas. All told, 18 states in the Union have enacted some "civil rights" legislation, designed to prevent discrimination for reasons of race, color or creed.

In an equal number of states, the legislatures have provided for "separate but equal facilities" for white and colored persons in one or more of these areas. All of the southern states and many of the border states have segregation laws on their books. Of course, the existence of these laws is not the sole index to the extent of segregation in the South. In those areas where laws have not been enacted, popular custom steps in to enforce the pattern of segregation. Throughout the southern states, segregation of whites and Negroes is enforced by either law or public custom in each of the above named areas.

It will be noted from the map that some 12 states have

neither "civil rights" nor segregation legislation. In general, these are states with fairly homogenous populations where the so-called "minorities problem" does not exist. Even many of these states, however, have enacted some legislation to assure the exercise of basic rights without discrimination as to religion or color. There are state laws prohibiting religious or color tests for public office, or as a prerequisite for serving on a jury or as a witness, or as a qualification to vote. Since these rights are also protected by the federal Constitution, their protection by state legislation serves merely to reenforce them.

Against this general background, here is the detailed picture of state laws in each of the areas mentioned.

Equal Access to Services and Accommodations

In the wake of the Supreme Court decision ruling out federal action to prevent discrimination in public places, several of the northern states enacted laws forbidding discrimination in places of public accommodation. A typical law is that of Washington—

> Every person who shall deny to any other person, because of race, creed or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, shall be guilty of a misdemeanor."

These laws now operate in 18 states of the Union. Their coverage in terms of places and activities goes beyond the original federal law. In general, they protect persons against discrimination on account of religious as well as racial difference; and in most cases, they protect the alien as well as the citizen.

These laws exist in California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington and Wisconsin. Louisiana has a civil rights act which is not enforced. Utah has an act making it unlawful for an innkeeper to refuse admission to a guest.

Persons Covered: California's act protects only citizens; the acts of all other states protect aliens as well

Against what type of discrimination?—"race or color"—California, Kansas, Massachusetts, Minnesota; "race, color or alienage"—Connecticut; "race, color, religion or national origin"—New York; "race, creed or color"—Colorado, Illinois, Indiana, Iowa, Michigan, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, Washington, Wisconsin.

Sanctions:—"civil action for damages only"—California; "criminal action only"—Connecticut, Iowa, Nebraska, Ohio, Pennsylvania, Rhode Island, Washington; "civil and criminal actions"—Colorado, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New York, Wisconsin.

In Illinois, in addition to a civil action for damages and a criminal prosecution, the accommodation in which a violation takes place may be enjoined as a nuisance. In New Jersey, the aggrieved party sues for damages under the statute, but the damages must be turned over to the state. Under the newly enacted Freeman Law in New Jersey, an aggrieved party may avoid the courts altogther, and file complaint with the State Department of Education which will handle the matter through administrative proceedings.

Enforcement—In New York and Illinois, the state Attorney General and his staff enforce the civil rights laws. In other states, criminal action can be instituted only on complaint of an aggrieved person. In New Jersey, under the Freeman Law, any complaint for discrimination in employment, educational institutions or public accommodations is handled by the State Department of Education through administrative rather than court proceedings. (For a discussion of the operation of anti-discrimination laws through administrative tribunals, see ahead page 96.

Public Accommodations—No state act attempts an all-inclusive definition of "public accommodation." Generally, several specific places are named, followed by the catch-all phrase "and all other places of public accommodation and amusement." Washington does not enumerate specific places, but

mentions only "accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement." The following table lists the major accommodations named in one or more acts and the states which specifically mention them.

Hotels	California, Connecticut, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Pennsylvania
Restaurants	all states with civil rights laws
Theatres	California, Colorado, Connecticut, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island
Travel	all states with civil rights laws
Barber shops	California, Colorado, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio
Ice cream parlors	California, Illinois, Iowa, Michigan, Minnesota, New Jersey, New York, Pennsylvania

In addition to these major accommodations, one or more states list: amusement parks, bathhouses, bathrooms, beauty parlors, billiard and pool parlors, boarding houses, boardwalks and public seashore, bowling alleys, cemeteries, dispensaries, drug stores, elevators, fairs, garages, golf courses, gymnasia, licensed places of entertainment, parks, public library, race course, rest rooms, skating rinks, stations and terminals.

Discriminatory Advertising Forbidden—Colorado, Illinois, Massachusetes, Michigan, New Jersey, New York and Pennsylvania forbid discriminatory advertising on the part of public accommodations. This practice is also forbidden in Maine and New Hampshire where, however, discrimination itself is not forbidden.

Segregation Compelled:

Laws compelling segregation of the races in all or some of the places of public accommodation or amusement exist in 16 states — Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina,

Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

Separation in transportation facilities:

—— separate railroad facilities—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia

—— separate sleeping compartments and bedding — Arkansas, Georgia, Texas

—— separate dining car facilities—South Carolina

—— separate waiting rooms—Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina

—— separation in buses—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Virginia

—— separation in street cars—Arkansas, Florida, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia

—— separation in steamboats and ferries—Maryland, North Carolina, South Carolina, Virginia

Under a recent Supreme court decision, a Negro who is a passenger on a vehicle passing from state to state need not comply with a request to change his seat on entering a state which requires segregation of Negro and white passengers.

Separation in recreation facilities:

—— separation at circuses—Louisiana, South Carolina

—— separation in theaters and public halls — Tennessee, Virginia

—— separation at parks, playgrounds and beaches—Missouri, Oklahoma, South Carolina

—— separation at racetracks—Arkansas

—— separation at billiard and poolrooms—Geogia, South Carolina, West Virginia

In those southern states where segregation is not required by law, it is generally required by custom and usage. Each of the southern states has some compulsory segregation laws on its books.

Equal Opportunity in Employment

Thirty-one states have enacted laws dealing with discriminatory practices in public employment; of these only 11 have

likewise enacted laws to deal with discriminatory practices in private employment.

Religious tests for public office—Forbidden in 22 states—Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin. Actually, under the Constitution, religious tests for public office would be illegal even in the absence of a specific law.

Religious inquiry for civil service position—Forbidden in 5 states—California, Illinois, Oregon, Pennsylvania, Wisconsin.

Discrimination in civil service for reasons of religion—Forbidden in 13 states—California, Connecticut, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Wisconsin.

Discrimination in civil service for reasons of race or color—Forbidden in five of the states which likewise forbid discrimination for reasons of religion—California, Connecticut, Massachusetts, Michigan, New York. Michigan also forbids removals from or demotions in civil service for religious or racial reasons. Pennsylvania declares that an employee of the police department may not be removed for religious or racial reasons, and forbids exclusion from examinations for employment in penal or correction institutions because of race or religious opinion.

Religious inquiry or tests for public school appointment—Forbidden in 8 states—California, Colorado, Idaho, Illinois, Iowa, Nebraska, New Mexico, New York.

Discrimination in public school appointment for reasons of religion—Forbidden in 4 states—California, New Jersey, Wisconsin, Wyoming.

Discrimination in public school appointment for reasons of race or color—Forbidden in California, New Jersey and Wisconsin. New Jersey also provides that dismissals from employment as principal or teacher, resulting from reduction in staff, shall not be based on race or religion.

Discrimination in employment on public works for reasons of religion—Forbidden in 7 states—California, Massachusetts Minnesota, New Jersey, New York, Ohio, Pennsylvania.

Discrimination in employment on public works for reasons of race or color—Forbidden in Illinois, Indiana and Kansas in addition to the 7 states which forbid discrimination in employment on public works for reasons of religion. New York, in addition, requires that public works contracts contain a provision against discrimination by contractors or subcontractors in hiring employees because of race, creed or national origin.

Discrimination in relief—Forbidden in 6 states—Illinois, Massachusetts, New York and Pennsylvania forbid discrimination in relief for reasons of race, color or creed. New Jersey forbids religious inquiry on application for relief. North Carolina forbids discrimination in relief on the basis of color.

Discrimination in employment in defense work for reasons of race, color or creed—Forbidden in 4 states—Illinois, Nebraska, New Jersey, New York. New York makes it a misdemeanor for any person to exclude a citizen of the state because of race, color, creed, national origin or previous condition of servitude from employment in defense industries or from public employment.

Discrimination by labor organizations—New York forbids discrimination or denial of membership by labor organizations for reasons of race, color, creed or national origin. Kansas and Nebraska laws declare that a labor organization which discriminates for reasons of race or color may not represent labor as collective bargaining agent.

Discrimination in employment by public utility—New York forbids refusal by public utility company to employ a person because of race, creed, color or national origin. Massachusetts forbids discrimination because of race, color or national origin by street railway company owned or financially aided by the state.

Fair Employment Practices Legislation—Fair Employment Practices laws, forbidding discrimination by private em-

ployers as well as labor unions, exist in 8 states—Connecticut, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island and Washington. Fair Employment Practices laws that are merely declaratory and contain no means of enforcement have been enacted in Indiana and Wisconsin. The New York law is typical.

What are unlawful employment practices under FEPC? (1) for an employer of six or more persons to refuse to employ or to discharge an individual because of race, creed, color or national origin or to discriminate against him in pay or other terms of employment; (2) for a labor organization, because of race, creed, color, or national origin, to exclude or expel an individual from membership or to discriminate against its members, an employer or his employees; (3) for an employer of six or more persons or an employment agency in a statement, advertisement, employment application blank or inquiry to express any requirment as to race, creed, color or national origin; (4) for an employer, a labor organization or employment agency to discriminate against an individual because he has instituted or assisted in any proceeding under the law; (5) for any person to aid, incite, or coerce the doing of any act forbidden by the law.

How is FEPC enforced? FEPC is generally enforced through a Commission against Discrimination whose members are appointed by the governor. The Commission has the power to receive, investigate and pass on complaints alleging discrimination, to hold hearings and to subpoena witnesses.

What is the procedure of enforcement? An applicant or employee who feels that he has been the victim of an unlawful employment practice may file a verified complaint with the Commission in which he sets forth the facts. The Commission then makes a prompt investigation through one of its Commissioners, and if it is determined that probable cause exists for believing the facts complained of, an attempt is made to eliminate the unlawful practice by conference, conciliation and persuasion.

If this fails, the Commission may order the employer or

organization charged to appear at a hearing before three members of the Commission excluding the member who made the investigation. If, at the hearing, the Commission finds that there has been an unlawful employment practice, it will issue an order requiring the offender to cease and desist and to right the wrong which has been committed, i.e. hire the person discriminated against. If no unlawful employment practice is found to have occurred, the complaint is dismissed. Review and enforcement of the Commission's orders is through the courts of the state.

What are the penalties under FEPC? Willful violation of an order of the Commission or willfully resisting or impeding the Commission in its attempts to enforce the law is a misdemeanor, punishable by a maximum of one year in prison or a maximum fine of $500 or both.

What groups are exempt from FEPC? Social, fraternal, charitable, educational and religious associations—all organizations which are not organized for private profit—are specifically excluded from the law.

What may employers do if their employees refuse to work with persons of particular races or creeds? They may appeal to the Commission for relief, since the law forbids any person, whether employer or employee, to obstruct its enforcement.

Does FEPC create a quota system in employment? No, a quota system is an unlawful employment practice under the law.

Segregation Compelled:

Laws compelling the separation of white and Negro labor on the job exist in 6 states—Arkansas, North Carolina, Oklahoma, South Carolina, Tennessee and Texas. In the remaining southern states, segregation of white and Negro employees, including separate toilet and eating facilities, is dictated by custom.

Equal Opportunity in Education

Twelve states have enacted laws outlawing discriminatory practices in the admission of students to educational institutions within the state.

Religious tests for students in public schools—Forbidden in 3 states—Colorado, Idaho, New Mexico.

Exclusion of or discrimination against students in public schools for reasons of race or color—Forbidden in 10 states—Colorado, Connecticut, Illinois, Indiana, Kansas, Michigan, New Jersey, New York, Pennsylvania, Rhode Island. New York makes it a misdemeanor for any person to exclude a citizen of the state for reasons of race, color, creed, national origin or previous condition of servitude.

Exclusion of students from public schools for reasons of religion or creed—Forbidden in New Jersey, New York and Pennsylvania.

Segregation in public schools expressly forbidden—Illinois, Indiana, Michigan and Pennsylvania. New Mexico forbids the separation of Spanish students, but authorizes the separation of whites and Negroes. In California and Texas, separation of Mexican-Americans by local school boards has been declared a violation of state law.

Segregation in public schools compelled or expressly permitted—Alabama, Arizona, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and the District of Columbia. Delaware, while permitting separate schools, requires no distinction as to race or color in the apportionment of school funds. Indiana, in 1949 legislative session, passed a law ending segregation in the public schools and including an anti-discrimination in education provision. Indians are segregated in separate schools in Delaware, North Carolina and Mississippi. The Kentucky and Oklahoma segregation laws also apply to private schools.

Discrimination for reasons of race, color or creed by educational institutions supervised by the state Regents—Forbidden in 3 states—New Jersey, New York, Pennsylvania. Educational institutions supervised by the state Regents generally include secondary schools (high schools), both public and private and state colleges.

Discrimination for reasons of race, color or creed in state colleges—Expressly forbidden in Idaho, Kansas and Nebraska, although most state universities, outside of the South, are non-discriminatory in their admissions policies.

Discrimination for reasons of race, color or creed in private colleges—Illinois declares that engineering schools and educational institutions generally which discriminate for reasons of race, color or creed shall not be accredited.

New York declares that education corporations holding themselves out to the public as non-sectarian and exempt from taxation are forbidden to deny the use of their facilities to persons because of race, color or religion. No enforcement procedure is provided.

More recently, New York enacted a law vesting power in the Commissioner of Education and the Board of Regents to receive complaints, investigate and hold hearings whenever there is reason to believe that a post-high school educational institution is discriminating in the admission of students on the basis of race, religion, color, creed or national origin. This law, known as the Fair Educational Practices law, is modelled after the Fair Employment Practices law and its enforcement procedure is similar — administrative hearings, the issuance of cease and desist orders and court enforcement where necessary. Sectarian institutions are exempt from the law.

The recently enacted Freeman Law in New Jersey in effect brings a Fair Educational Practices Act to that state. As previously noted, the Freeman Law is an Omnibus Act, dealing with discrimination in employment, education and public accommodations and enforced administratively through the State Department of Education.

Separate Colleges Compelled:

Separate Colleges for whites and Negroes are required under the laws of 15 states—Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Maryland, Missouri, North Carolina, (Indians also separated), Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia. Under a recent Su-

preme Court decision, where separate educational facilities for Negroes do not exist, the state must provide them or must create facilities within the framework of those provided for white students.

Many of the southern states have miscellaneous segregation provisions in education including requirements of separate agricultural and trade schools, separate teacher training schools, separate libraries, segregation in juvenile delinquent and reform schools and provisions that teachers and pupils must be of the same race.

Equal Opportunity in Housing

Laws dealing with discrimination or segregation in housing have been enacted in 7 states—Colorado, Illinois, Kansas, Massachusetts, Minnesota, New York and Pennsylvania.

Zoning residential areas on basis of race or color—Expressly forbidden in Colorado and Kansas. Under a Supreme Court decision, zoning ordinances which create separate areas for the different races are illegal. Practically, therefore, segregation in housing by ordinance is forbidden throughout the country.

Discrimination for race, creed or color in public housing and veterans' housing—Forbidden in Massachusetts and New York. New York City has a local ordinance which forbids discrimination in any housing project which receives tax exemption, i. e. quasi-public housing such as that sponsored by insurance companies.

Discrimination for race, creed or color in redevelopment housing—Redevelopment housing is the replacement of a slum area with a newly planned community. Pennsylvania requires that contracts for redevelopment projects include a clause against discrimination because of race, color, religion or national origin. Minnesota forbids discrimination in selection of tenants for redevelopment projects on the basis of religious or political affiliation. Illinois forbids displacing the dominant racial group in an area where a redevelopment project is planned.

Restrictive Covenants—The racial restrictive covenant in

a deed or lease by which land cannot be sold or leased to persons of particular religious or racial groups has been void in Minnesota since 1919. Under a recent Supreme Court decision, the racial restrictive covenant cannot be enforced in the courts, with the result that the covenant is now void throughout the country. This only means, however, that it cannot be enforced when a seller or lessor refuses to be bound by it; it does not mean that a seller cannot legally hold to the terms of a racial restrictive covenant and refuse to sell to a person who is barred by its terms.

Equal Opportunity to Health and Welfare Service

New Jersey and New York are the only states which have any laws dealing with the problem of discrimination in health and welfare services. New Jersey forbids discrimination for reasons of race, creed, color, national origin or ancestry in the admission of disabled or indigent sick to city hospitals. Both states, in their public accommodation laws, include clinics, dispensaries and hospitals in the enumeration of public accommodations in which discrimination for race, color or creed is forbidden.

Among the southern states, segregation in hospitals and welfare institutions is the general rule. Georgia, Mississippi, and South Carolina have general laws requiring segregation of Negroes and whites in hospitals. Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Virginia and West Virginia require separation of white and Negro mental patients. Alabama, Arkansas, Delaware, Maryland, Oklahoma, Texas and West Virginia require the separation of tubercular patients. Alabama prohibits a female white nurse from tending a male Negro patient. Alabama and Georgia require separate poor houses for Negroes and whites. Delaware, Kentucky, North Carolina, Oklahoma, Tennessee and West Virginia require separate orphan and old-age homes for Negroes and whites.

Miscellaneous Anti-Discrimination Provisions

Discrimination by insurance companies—Discrimination against

Negroes by insurance companies is forbidden in 6 states—Connecticut, Michigan, Minnesota, New Jersey, New York, Ohio.

Discrimination against the dead—Discrimination for reasons of race or color in the price of graves or burial plots is forbidden in Illinois. Discrimination by cemetery associations on the basis of race, color, creed or national origin is forbidden in New York. New Jersey forbids discrimination by cemetery corporations for reasons of color.

Discrimination against purchase of liquor—New York forbids the refusal to sell liquor based solely on the race or color of the purchaser.

The Alien and the Law

State restrictions on the occupations in which aliens may engage present a "crazy quilt". There is complete accord that an alien may not be admitted to the practice of law, but beyond this, the state laws as well as state court decisions differ widely.

In general, liquor licenses will not be issued to aliens, but the courts divide on the issuance of licenses to operate soft drink and ice cream parlors and on the issuance of peddlers' licenses. One state court has held that a law prohibiting an alien from being licensed as a bus driver was constitutional while another held that a state law could not validly exclude aliens from obtaining chauffeurs' licenses. One court has held that the medical profession may not be limited to citizens only, while another has held that the practice of pharmacy may properly be restricted to aliens.

It is not the purpose of this section to review the multitude of divergent state regulations, but rather to consider the legal principles involved and to call attention to the most recent trends. Suffice it to say that such widely scattered occupations as—to mention a few—accountant, attorney, auctioneer, barber, billiard room operator, chauffeur, embalmer, fisherman, hawker, pharmacist, race track employee and watchman—are off-bounds in many states to aliens generally or to those aliens who have not declared their intention to become citizens.

It is apparent from this list that it is in the area of licensed occupations that the alien runs aground of discriminatory state

laws. The Supreme Court in 1915 held unconstitutional a state law which sought generally to restrict the alien's right to work and the employer's right to hire him.

The Japanese on the Pacific coast have been in a particularly unhappy and vulnerable position. Ineligible to citizenship, the foreign-born Japanese in this country have run into state laws barring them from ownership of land and from fishing licenses. They can never become citizens under present naturalization laws, and therefore, their property rights and their opportunities to earn a livelihood are severely restricted.

Two decisions of the Supreme Court in the 1947-48 Term made a start at breaking down this pattern. In one case, a California law prohibiting the issuance of fishing licenses to aliens ineligible to citizenship was held to be discriminatory against Japanese aliens and a violation of the equal protection of the laws clause of the Fourteenth Amendment. The Court, in holding the law invalid, did not limit its decision to the fact of discrimination against Japanese aliens, but invalidated discrimination against "any or all aliens." Thus, for a state to deny fishing licenses to aliens for the sole reason that they are aliens is unconstitutional, notwithstanding the fact that the state is the owner of fish and game, and that in regulating these areas, the state exercises the power of ownership as well as police power.

In tossing out the "state ownership" basis for restricting the occupations of aliens, this decision my well presage the end of exclusion of aliens from employment on public works. Up to the present time, state laws denying to aliens employment on public works have been held constitutional.

In the second case, the Court considered a California law aimed at increasing the restriction against Japanese ownership of land. An earlier California law forbids aliens ineligible to citizenship (foreign-born Japanese) from owning land. To get around the law, many older Japanese paid the price for land but took title in the names of their American-born children who are citizens of this country. To put an

end to this practice, California passed a law to the effect that in all such transactions, there shall be a presumption of intent to evade the law.

If constitutional, such a law would threaten the title to and ownership of land in American-born Japanese. The Supreme Court, in a decision which comes close to voiding all laws restricting land ownership by aliens, declared the law to be a denial of equal protection of the laws to American citizens of Japanese descent. Almost simultaneous with this decision, the California Supreme Court ruled that alien Japanese may own commercial property.

While neither of these cases deals with the constitutionality of laws barring specific private occupations to aliens, both point up the absence of any reasonable basis for such laws. The decisions indicate that, for purposes of state laws, the alien will come increasingly to be judged on his individual record rather than as a member of a class.

CONCLUSION

On this note, one may summarize the overall trend in the field of civil rights, both on the federal and state levels. With an increasing number of states beginning to grapple with the problems of discrimination and second-class citizenship, and with the federal government strengthening its protection of the rights of the people, there is being written into the law a philosophy to live by—that all men are not only created free and equal, but that each man is entitled to his rights as an individual and a human being, without regard to his race, color, creed or class.